82-965

NO. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

L. Q. LINAHAN, WARDEN,
Petitioner,

v.

REBECCA A. MACHETTI
A/K/A REBECCA A. SMITH,
Respondent.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.

Whether, in light of the decisions of this Court in *Engle v. Isaac*, ____U.S.____, 71 L.Ed.2d 783 (1982) and *United States v. Frady*, ____U.S.____, 71 L.Ed.2d 816 (1982), a federal court when reviewing a state court conviction by means of a habeas corpus proceeding, can decide a claim of unconstitutional jury composition on its merits, without a threshold inquiry as to "cause" and "prejudice" where there is a state procedural rule requiring that all jury challenges are waived if not brought prior to or at the time of trial?

2.

Whether the United States Court of Appeals for the Eleventh Circuit improperly cited *Lefkowitz v. Newsome*, 420 U.S. 283 (1975) and *Newman v. Henderson*, 539 F.2d 502 (5th Cir. 1976) for the proposition that, even in the presence of a state procedural waiver rule, the court could consider Respondent's claims concerning the composition of the grand and traverse juries on their merits?

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B. THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT IMPROPERLY ADJUDICATED RESPONDENT'S JURY COMPOSITION CLAIMS ON THEIR MERITS, IN THE FACE OF A VALID STATE PROCEDURAL WAIVER RULE, CITING *LEFKOWITZ V. NEWSOME*, 420 U.S. 283 (1975) AND *NEWMAN V. HENDERSON*, 539 F.2d 502 (5th Cir. 1976) 13

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IN THE

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L. Q. LINAHAN, WARDEN,
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v.

REBECCA A. MACHETTI
A/K/A REBECCA A. SMITH,
Respondent.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Eleventh Circuit is reported as *Machetti v. Linahan*, 679 F.2d 236 (11th Cir. 1982). A copy of this opinion is also attached in the appendix to this brief.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on June 25, 1982. *See Machetti v. Linahan*, 679 F.2d 236 (11th Cir. 1982). A timely petition for rehearing en banc filed by Petitioner Linahan was denied on August 24,1982. (A copy of this order of the United States Court of Appeals for the

Eleventh Circuit is contained in the Appendix.) Petitioner Linahan also filed a motion for a stay of the issuance of the mandate pending this petition for a writ of certiorari which motion was granted through and including October 23, 1982. However, a motion to grant an additional thirty day stay of the mandate was denied by the United States Court of Appeals for the Eleventh Circuit on August 26, 1982. This petition for a writ of certiorari has been filed within the ninety days allowed under 28 U.S.C. § 2101(c), from the entry of judgment by the United States Court of Appeals for the Eleventh Circuit. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

O.C.G.A. § 15-12-162 (Michie 1982), Ga. Code Ann. § 59-803 (Harrison 1977):

> "The accused may, in writing, challenge the array for any cause going to show that it was not fairly or properly impaneled or ought not be put upon him. The court shall determine the sufficiency of the challenge at once. If sustained, a new panel shall be ordered; if not sustained the selection of jurors shall proceed."

O.C.G.A. § 9-14-42 (Michie 1982), Ga. Code Ann. § 50-127(1) (Harrison 1977):

> "Except for objections relating to the composition of a grand or traverse jury, rights conferred or secured by the Constitution of the United States shall not be deemed to have been waived unless it is shown that there was an intentional relinquishment or abandonment of a known right or privilege which relinquishment or abandonment was participated in by the party and was done voluntarily, knowingly, and

intelligently. The right to object to the composition of the grand or traverse jury will be deemed waived under this section, unless the person challenging the sentence shows in the petition and satisfies the court that cause exists for his being allowed to pursue the objection after the conviction and sentence has otherwise become final."

STATEMENT OF THE CASE

Respondent, Rebecca A. Machetti a/k/a Rebecca A. Smith, was convicted of two counts of murder in the Superior Court of Bibb County, Georgia on March 1, 1975. Petitioner received two consecutive death sentences for these offenses following her jury trial. The Supreme Court of Georgia affirmed Respondent's sentences and convictions on direct appeal in *Smith v. State*, 236 Ga. 12 (1976), *cert. denied, Smith v. Georgia*, 429 U.S. 932 (1976). A petition for rehearing was denied in this Court on January 10, 1977.

On January 13, 1977, Respondent filed a petition for a declaratory judgment and/or presentence hearing and stay of execution in the Superior Court of Bibb County, Georgia. This petition was denied and the judgment of the Superior Court of Bibb County, Georgia, was affirmed by the Supreme Court of Georgia in *Smith v. State*, 238 Ga. 655 (1977). A petition for certiorari from this judgment was filed in this Court and denied on October 3, 1977. *See Smith v. Georgia*, 428 U.S. 910 (1977), *rehr. denied*, 429 U.S. 874 (1977).

Respondent filed a petition for a writ of habeas corpus in the Superior Court of Baldwin County, Georgia, on January 9, 1979, raising for the first time a challenge to the composition of the grand and traverse juries. A two day state habeas corpus hearing was held in the Superior

Court of Baldwin County and Respondent's petition for a writ of habeas corpus was denied on May 9, 1979. As will be discussed *infra*, Petitioner claims that the state habeas corpus court considered evidence with reference to the jury composition issues for the purpose of determining whether or not trial counsel was ineffective for failing to challenge the composition of these juries and that the state habeas corpus court's findings did not amount to a determination on the merits of these issues, but rather a determination of whether there was "cause" or "prejudice" under *Francis v. Henderson*, 425 U.S. 536, 542 (1976).

Respondent's application for a certificate of probable cause to appeal was denied by the Supreme Court of Georgia on July 10, 1979. A motion for reconsideration was denied by that court on July 17, 1979. A petition for a writ of certiorari filed in this Court was denied on October 3, 1979.

Respondent then filed a federal habeas corpus petition in the United States District Court for the Middle District of Georgia, Macon Division, in which she again raised her claims relating to the composition of the grand and traverse juries. Petitioner responded to this application for federal habeas corpus relief under 28 U.S.C. § 2254, by stating, *inter alia*, that Respondent had waived her right to challenge the composition of the grand and traverse juries by failing to follow the Georgia procedural rule requiring that a challenge to the array of these juries be made in a timely manner. Nevertheless, the district court did not address the waiver issue, but rather, determined that this Court's decision in *Duren v. Missouri*, 439 U.S. 459 (1979), was not retroactively applicable to Respondent's case so as to authorize a finding of uncon-

stitutional representation as to women in the jury boxes.

Respondent appealed to the United States Court of Appeals for the Eleventh Circuit arguing that *Duren v. Missouri, supra*, was retroactively applicable to her case. Following oral argument, the United States Court of Appeals for the Eleventh Circuit in *Machetti v. Linahan*, 679 F.2d 236 (11th Cir. 1982), rendered a decision addressing Respondent's jury composition claims on their merits, with no reference to Petitioner's waiver argument based on the state procedural rule requiring that all challenges to jury composition must be raised prior to or at the time of trial. A petition for rehearing en banc was timely filed but denied by the United States Court of Appeals for the Eleventh Circuit on August 24, 1982. It is from the decision of the United States Court of Appeals for the Eleventh Circuit, addressing Respondent's jury composition claims on their merits, without a prior determination as to whether there has been waiver under the cause and prejudice standard of *Francis v. Henderson, supra*, that Petitioner now seeks a writ of certiorari from this Court.

REASONS FOR GRANTING THE WRIT

A. WHERE A STATE PROCEDURAL RULE REQUIRES THAT ALL CHALLENGES TO THE COMPOSITION OF THE JURY MUST BE WAIVED IF NOT BROUGHT PRIOR TO OR AT THE TIME OF TRIAL, A FEDERAL COURT CANNOT REVIEW, IN A HABEAS CORPUS PROCEEDING BROUGHT BY A STATE PRISONER, A CLAIM OF UNCONSTITUTIONAL JURY COMPOSITION ON ITS MERITS, WITHOUT A THRESHOLD INQUIRY AS TO "CAUSE" AND "PREJUDICE".

In January of 1975 this Court held in *Taylor v. Louisiana*, 419 U.S. 522 (1975), that a statute automatically excluding women from jury service unless they opted to be included by written request, a so-called "Opt-In Statute" was unconstitutional. In February of 1975, Respondent was tried and convicted in the Superior Court of Bibb County, Georgia. She was sentenced to death on March 1, 1975. That same year, a Georgia statute providing that women were to be automatically included in jury lists unless they opted not to serve, a so-called "Opt-Out Statute", as codified in Ga. Code Ann. § 59-124, was repealed.

As noted in the "Statement of the Case" portion of this petition, Respondent filed no jury challenge at the time of her trial, but later attacked the composition of the grand and traverse juries by means of her petition for a writ of habeas corpus filed in the Superior Court of Baldwin County, Georgia. At the time that Respondent filed her state habeas corpus petition in January of 1979, this Court in *Duren v. Missouri*, 439 U.S. 357 (1979), held that a state statute which allowed women by request to opt-out of jury service, was unconstitutional.

Respondent urged in her state habeas corpus petition that her trial attorney was ineffective for failing to challenge the composition of the grand and traverse juries and that she was deprived of her fundamental right to indictment and trial by a jury selected from a representative cross-section of the community. One of the reasons alleged was that under Ga. Code Ann. § 59-124, which as previously noted was repealed in 1975, any women who did not desire to serve on a jury panel could "opt-out." Although Respondent has asserted and the United States Court of Appeals for the Eleventh Circuit has deter-

mined, that the state habeas corpus court considered the jury composition issues on their "merits" in denying Respondent's petition for a writ of habeas corpus, Petitioner urges this Court to reexamine the order of the state habeas corpus court, in a different light. Specifically, Petitioner submits that although the state habeas corpus court did address the proof presented by the Respondent at the state habeas corpus proceeding with reference to her claims that the grand and traverse juries were non-representative and that counsel had been ineffective for failing to challenge the composition of these juries, the state habeas corpus court's review was, in effect, an examination of the evidence to determine if it met the "cause and prejudice" standard set forth by this Court in *Francis v. Henderson*, 425 U.S. 536, 542 (1976). Petitioner asserts that this is the only fair reading of the state habeas corpus court's order, in light of the timeliness requirement under Georgia law with respect to jury challenges.

The general rule of Georgia procedure has long required a defendant to make a jury challenge at, or before, the time the jury is "put upon him." O.C.G.A. § 15-12-162 (Michie 1982), Ga. Code Ann. § 59-803 (Harrison 1977). *See also Cobb v. State*, 218 Ga. 10, 21-22 (1962). However, Georgia procedure recognizes a "cause" exception to this timeliness requirement, as does federal procedure. *See Simmons v. State*, 226 Ga. 110 (1970) and *Francis v. Henderson*, 425 U.S. 536, 542 (1976).

The cause requirement is also contained in that portion of the Georgia law relating to habeas corpus and provides as follows:

> "Except for objections relating to the composition of a grand or traverse jury, rights conferred or secured by the Constitution of the United States shall not be deemed to have been waived unless it is shown

> that there was an intentional relinquishment or abandonment of a known right or privilege which relinquishment or abandonment was participated in by the party and was done voluntarily, knowingly, and intelligently. The right to object to the composition of the grand or traverse jury will be deemed waived under this section, unless the person challenging the sentence shows in the petition and satisfies the court that cause exists for his being allowed to pursue the objection after the conviction and sentence has otherwise become final."

In *Francis v. Henderson, supra,* this Court held that a federal habeas corpus petitioner must establish not only the requisite "cause" for a failure to challenge the compositions of the grand or traverse juries prior to trial, but must also show "actual prejudice", if these petitioners are to be allowed to raise jury composition issues without complying with the state procedural law providing that all challenges to the arrays of the jury must be timely.

Clearly, as it is not contested that Respondent did not challenge the compositions of the grand or traverse jury at or before the time the jury was put upon her, as required under Georgia law, the state habeas corpus court was required to make a determination as to whether or not Respondent has established "cause" which would exempt her from this timeliness requirement. It appears that the "cause" being alleged by Respondent in her state habeas corpus petition was the ineffective assistance of her trial counsel. Therefore, Petitioner submits that the testimony which was offered with reference to the compositions of the grand and traverse jury was an attempt to establish the requisite "cause" necessitated under Georgia law for untimely challenges and the necessary cause and prejudice required for the consideration of untimely jury challenges as established by this Court's

decision in *Francis v. Henderson, supra.*

Petitioner submits that the state habeas corpus court was forced to examine the jury composition issues on their "merits" to make a determination if cause and/or prejudice had been established by the Respondent. When the state habeas corpus court determined that the Respondent had not shown the significant disparity necessary for finding that the jury was non-representative (see order of the state habeas corpus court, p. 91 in the Appendix), this was in effect a finding that no prejudice had been shown.

Petitioner submits that the next finding by the state habeas corpus court with reference to Respondent's claim that counsel had been ineffective for failing to challenge the composition of the grand and traverse juries, was in effect addressed to whether or not Respondent had established "cause". In finding that counsel was not ineffective for failing to challenge the composition of the grand and traverse juries, Respondent found no "cause" exception to the timeliness requirement for jury challenges under Georgia law.

Petitioner asserts that the fact that there was no explicit finding that Respondent had not established "cause" and "prejudice" does not mean that these issues were heard on their "merits". Rather, Petitioner asserts that the only matter which the state habeas corpus court could properly have determined is whether or not the evidence presented on behalf of the Respondent established the necessary cause and/or prejudice to preclude the court from finding that she had waived any right to make these challenges. On this basis, Petitioner asserts that the United States Court of Appeals for the Eleventh Circuit erred in holding that they could examine the jury composition

issues raised for the first time in the state habeas corpus hearing because the state habeas corpus court had entertained the federal constitutional claims on their merits. *Machetti v. Linahan*, 679 F.2d 236, n. 4 (11th Cir. 1982)

After Respondent had filed her federal habeas corpus petition in the United States District Court for the Middle District of Georgia, Petitioner responded to the show cause order with an answer-response which asserted the state procedural waiver rule as to the jury composition issues. However, the district court found that the United States Magistrate had improperly applied this Court's decision in *Duren v. Missouri*, 439 U.S. 357 (1979), because the district court found that *Duren* was not applicable to Respondent's case because it was decided at a time when Respondent was proceeding with her avenues of collateral review, rather than direct review. Based on the district court's finding that no claim for relief was warranted on the basis of the jury composition issues, Petitioner did not object to the district court's order. However, on appeal to the United States Court of Appeals for the Eleventh Circuit, Petitioner sought a remand to the district court in order to allow the district court to consider all of the legal aspects of Respondent's claims, not for the purpose of presenting any other evidence on the claims on their "merits," in the form of statistical evidence or additional evidence from such witnesses as the jury commissioners. If a remand had been granted from the Eleventh Circuit, Petitioner could have reasserted the waiver claim and offered testimony and/or argument with reference to the issues of "cause" and "prejudice". For example, Petitioner could have submitted evidence relative to the number of women whom the Respondent, through her counsel, struck off of the traverse jury panel at her trial. Petitioner submits that such evidence as this, would be rele-

vant to the question of whether or not cause and prejudice had been established so as to avoid the state procedural waiver rule.

Petitioner contends that the United States Court of Appeals for the Eleventh Circuit should have made a preliminary inquiry as to "cause" and "prejudice" before addressing the jury composition issues on their merits. The failure of the Eleventh Circuit to make this threshold inquiry is in direct conflict with numerous decisions of this Court including the recent opinions of the court in *Engle v. Isaac*, ____U.S.____, 71 L.Ed.2d 783 (1982) and *United States v. Frady*, ____U.S.____, 71 L.Ed.2d 816 (1982).

In *Engle v. Isaac, supra*, this Court considered whether state prisoners could litigate the constitutionality of self-defense instructions given at trial, when such persons had forfeited their right to litigate these claims in the state courts. This Court stated:

> "While the nature of a constitutional claim may affect the calculation of cause and actual prejudice, it does not alter the need to make that threshold showing. We reaffirm, therefore, that any prisoner bringing a constitutional claim to the federal courthouse after a state procedural default must demonstrate cause and actual prejudice before obtaining relief."

Engle v. Isaac, ____U.S.____, 71 L.Ed.2d 783, 801 (1982).

Under this standard, before Respondent could bring her constitutional claims with reference to composition of the grand and traverse juries in her federal habeas corpus proceeding, she would have had to demonstrate "cause" and "prejudice" to exempt her from the state procedural waiver rule and Petitioner asserts this is exactly what the state habeas corpus court found that Respondent had failed to do in rejecting her claims for relief. Therefore,

the federal district court should not have considered these claims on their merits, even though relief was denied on these issues. Additionally, the United States Court of Appeals for the Eleventh Circuit clearly erred in holding that these claims had been considered on their "merits", thereby allowing that court to consider the merits of the claim with no necessity of inquiring into whether or not Respondent could establish cause and prejudice.

Similarly, in *United States v. Frady*, ____U.S.____, 71 L.Ed.2d 816 (1982), this Court found that before a federal court could consider the merits of Mr. Frady's complaint relating to allegedly erroneous jury instructions as to malice, in the presence of a contemporaneous objection rule applicable in the state courts, Mr. Frady had to meet the "cause and actual prejudice" standard enunciated in *Davis v. United States*, 411 U.S. 233 (1973), as extended in *Francis v. Henderson*, 425 U.S. 536 (1976) and *Wainwright v. Sykes*, 433 U.S. 72 (1977).

As in *United States v. Frady, supra*, Petitioner asserts that the proper standard for review by the federal habeas corpus court and the United States Court of Appeals for the Eleventh Circuit was the "cause and actual prejudice" standard and that the court erred in not viewing any evidence presented by the Respondent at the state habeas corpus hearing in light of this standard also codified under Georgia law. The failure of the United States Court of Appeals for the Eleventh Circuit to make this threshold inquiry of cause and prejudice, greatly undermines the validity of the state procedural waiver rule and allows state prisoners to avoid timeliness requirements for jury challenges by having them considered on their merits for the first time by the state habeas corpus court with no necessity of establishing "cause".

B. THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT IMPROPERLY ADJUDICATED RESPONDENT'S JURY COMPOSITION CLAIMS ON THEIR MERITS, IN THE FACE OF A VALID STATE PROCEDURAL WAIVER RULE, CITING *LEFKOWITZ v. NEWSOME*, 420 U.S. 283 (1975) AND *NEWMAN v. HENDERSON*, 539 F.2d 502 (5th Cir. 1976).

The United States Court of Appeals for the Eleventh Circuit reached the merits of Respondent's jury composition claims based on a misinterpretation of this Court's decision in *Lefkowitz v. Newsome*, 420 U.S. 283 (1975). In note 4 of the court's decision it stated the following as being the holding of *Lefkowitz v. Newsome*, *supra*, and *Newman v. Henderson*, 539 F.2d 502, 504 (5th Cir. 1976):

> "Where, however, the state habeas corpus court entertains the federal constitutional claims on the merits, as in the instant case, the federal habeas court must also adjudicate the merits. (cites omitted)."

In *Lefkowitz v. Newsome*, *supra*, this Court found that Mr. Newsome was not barred from presenting issues relating to the lawfulness of a search or the voluntariness of his confession, even where he had pled guilty, because state law permitted a defendant to plead guilty without forfeiting the right to have such constitutional issues as these reviewed. In *Lefkowitz v. Newsome*, Mr. Newsome pled guilty to a drug charge, but under the applicable New York statute, appealed to the state court on direct appeal his federal constitutional claim that evidence seized incident to an unlawful arrest should have been suppressed. This Court found that under these circumstances, Mr. Newsome was not precluded from raising this claim in a federal habeas corpus proceeding. The Court found:

> "Newsome has satisfied all of the prerequisites for

> invoking the habeas corpus jurisdiction of the federal courts. He is no less entitled to federal review of his constitutional claim than is any other defendant who raises his claim in a timely fashion, in accordance with state procedure and who pursues his claim through all available levels of state appellate review."

Id. at 291.

The situation presented to this Court in *Lefkowitz v. Newsome, supra,* is clearly distinguishable from the facts of this case. Respondent has not satisfied all the prerequisites for invoking habeas corpus jurisdiction as to her jury composition claims. Unlike Mr. Newsome, Respondent did not raise her claim in a timely fashion and in accordance with state procedure, but rather raised for the first time in a state habeas corpus proceeding her claims of illegal jury composition. As already noted with respect to the first argument made in this petition for a writ of certiorari, where there has been no compliance with state procedure, there must at least be a threshold showing as to "cause" and "prejudice" before the merits can be reached. *Lefkowitz v. Newsome,* does not provide authority for the United States Court of Appeals for the Eleventh Circuit's consideration of the Petitioner's constitutional claim without some consideration of, at the very least, the issue of deliberate by-pass. Lefkowitz had preserved all of his rights and therefore no showing as to deliberate by-pass or whether he should be exempt from a state procedural waiver rule was necessary. Clearly, *Lefkowitz v. Newsome, supra,* does not permit proceeding to the merits of such claims as that raised by the Respondent, under the circumstances presented here.

Similarly, Petitioner contends that the United States Court of Appeals for the Eleventh Circuit improperly

relied on the prior decision of the United States Court of Appeals for the Fifth Circuit in *Newman v. Henderson*, 539 F.2d 502 (5th Cir. 1976), to reach the merits of Respondent's jury composition claims. In *Newman v. Henderson, supra*, the defendant had been convicted of aggravated rape but had applied for a writ of habeas corpus in Louisiana charging racial discrimination in the selection of the grand jury. He was denied relief based on a finding that the grand jury system prevailing at the time of his indictment had not been discriminatory. However, the district court granted his petition for a writ of habeas corpus finding that the state had failed to rebut the prima facie showing made by the defendant as to grand jury discrimination. On appeal to the United States Court of Appeals for the Fifth Circuit, the court found that the waiver principle of *Davis v. United States*, 411 U.S. 233 (1973), did not bar a federal determination of the merits of Mr. Newman's constitutional claim of grand jury discrimination. This was because the state courts had considered his claim of racial discrimination on its merits. However, it is readily apparent that the facts of *Newman v. Henderson, supra*, are distinguishable from those in the instant case. First, this Court makes no reference to any state procedural waiver rule concerning jury composition claims which exists in the State of Louisiana. Therefore, Mr. Newman was not barred from presenting his claims relating to the selection of the grand jury for the first time in his state habeas corpus proceeding. Additionally, as has been previously argued, the state habeas corpus court in *Newman v. Henderson, supra*, considered his claims on their merits, whereas, in this case, Petitioner contends that the state habeas corpus court only determined that Respondent had not shown "cause" or "prejudice" to allow her claims to be litigated.

The facts in *Newman v. Henderson* and *Lefkowitz v. Newsome* are clearly distinguishable from those presented in this case and are not sufficient authority to allow the federal court on review of a state prisoner's federal habeas corpus action, to proceed to the merits of Respondent's jury composition claim in the presence of a state procedural waiver rule. Therefore, this Court should at least vacate the judgment of the United States Court of Appeals for the Eleventh Circuit and remand the case to the court for further consideration in light of *Lefkowitz v. Newsome, supra* and *Francis v. Henderson, supra.*

CONCLUSION

Because the United States Court of Appeals for the Eleventh Circuit improperly considered the merits of Respondent's jury composition claims, without a threshold inquiry into the issues of "cause" and "prejudice", and thereby, improperly granted Respondent habeas corpus relief, a petition for a writ of certiorari should be granted to review the decision of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Susan V. Boleyn, Attorney of Record for the Petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have served three copies of the foregoing Petition for Writ of Certiorari upon the Respondent by depositing same in the United States mail with sufficient, first class postage affixed thereto, and addressed to counsel for Respondent as follows:

Ms. Mary Ann B. Oakley
1950 Peachtree Summit
401 West Peachtree Street, N.W.
Atlanta, Georgia 30308

Mr. John Charles Boger
10 Columbus Circle
New York, New York 10019

Mr. Anthony Amsterdam
40 Washington Square
New York, New York 10012

This 12th day of November, 1982.

/s/
SUSAN V. BOLEYN

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[U.S. Court of Appeals, Eleventh Circuit, Filed August 24, 1982. Norman E. Zoller, Clerk]

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 81-7614

REBECCA A. MACHETTI, a/k/a REBECCA A. SMITH,
Plaintiff-Appellant,

versus

L. Q. LINAHAN, Warden, Georgia Women's Correctional Institution,
Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Georgia

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion June 25, 11 Cir., 1982, ___F.2d___).

Before INGRAHAM*, HATCHETT and ANDERSON, Circuit Judges

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the

*Judge, 5th Circuit Court of Appeals, sitting by designation.

members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ JOSEPH W. HATCHETT
United States Circuit Judge

REHG-6

Rebecca A. MACHETTI, a/k/a Rebecca A. Smith, Plaintiff-Appellant,

v.

L. Q. LINAHAN, Warden, Georgia Women's Correctional Institution, Defendant-Appellee.

No. 81-7614.

United States Court of Appeals,

Eleventh Circuit.

June 25, 1982.

Habeas petitioner appealed from a decision of the United States District Court for the Middle District of Georgia, Wilbur D. Owens, Jr., Chief Judge, 517 F.Supp. 1076, denying her petition. The Court of Appeals, Hatchett, Circuit Judge, held that state jury selection procedure that permitted any woman who did not wish to serve on a jury to opt out merely by sending notice to the jury commissioners deprived petitioner of her right to an impartial jury trial.

Reversed and remanded with directions.

1. Habeas Corpus 25.1(3, 4)

Generally, a federal court will honor a valid state procedural rule that a defendant's failure to object to a grand or petit jury before or during trial constitutes waiver of that objection as a basis for habeas corpus relief. 28 U.S.C.A. § 2254.

2. Habeas Corpus 45.1(4)

Where state habeas court entertains federal constitutional claims on the merits, the federal habeas court must also adjudicate the merits. 28 U.S.C.A. § 2254.

3. Grand Jury 2½
Jury 33(1.1)

Constitutional guarantee of the right to an impartial jury also embraces a right that grand and petit juries be selected at random so as to represent a fair cross section of the community. U.S.C.A.Const.Amend. 6.

4. Constitutional Law 213.1(1)

Prima facie case of an equal protection violation may be rebutted by proving an absence of discriminatory purpose or that such purpose did not have a determinative effect. U.S.C.A.Const.Amends. 5, 14.

5. Jury 33(1.1)

Since systematic disproportion alone establishes a prima facie claim that a jury did not represent a fair cross section of the community, rebuttal evidence focuses on the significant state interest which justifies the imbalance. U.S.C.A.Const.Amend. 6.

6. Grand Jury 2½
Jury 33(1.5)

Evidence that the traverse jury list from which habeas petitioner's jury was drawn was composed of only 18 percent women and that the grand jury list contained only 12 percent women, although the county's population was comprised of 54 percent women, constituted an adequate prima facie showing that the jury did not represent a fair cross section of the community. U.S.C.A.Const.Amend. 6; 28 U.S.C.A. § 2254.

7. Habeas Corpus 85.5(12)

Habeas petitioner's proof sufficiently established that the underrepresentation of women in the jury selection

process in her case was due to a state jury selection procedure that permitted any woman who did not wish to serve on a jury to opt out merely by sending written notice to the jury commissioners. Ga.Code, § 59-124 (Repealed); U.S.C.A.Const.Amend. 6; 28 U.S.C.A. § 2254.

8. Jury 33(1.5)

State jury selection procedure that permitted any woman who did not wish to serve on a jury to opt out merely by sending written notice to the jury commissioners deprived habeas petitioner of her right to an impartial jury trial. 28 U.S.C.A. § 2254; Ga.Code, § 59-124 (Repealed); U.S.C.A.Const.Amends. 6, 14.

Appeal from the United States District Court for the Middle District of Georgia.

Before INGRAHAM*, HATCHETT and ANDERSON, Circuit Judges.

HATCHETT, Circuit Judge:

This appeal requires a review of the principles of constitutional law governing the fair cross-section requirement of jury composition. We hold that Georgia's jury selection procedure violated appellant's sixth and fourteenth amendment right to an impartial jury trial and reverse and remand to the district court, 517 F.Supp. 1076, with directions to issue the writ of habeas corpus.

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*Honorable Joe M. Ingraham, U. S. Circuit Judge for the Fifth Circuit, sitting by designation.

I. BACKGROUND

Appellant, Rebecca Machetti, seeks federal habeas corpus relief under 28 U.S.C. § 2254 (1977), from two consecutive death sentences. The sentences were imposed by the Superior Court of Bibb County, Georgia, following her February, 1975, jury conviction for two murders. On appeal, the Supreme Court of Georgia affirmed the convictions and sentences and denied her petition for rehearing. *Smith v. State*, 236 Ga. 12, 222 S.E.2d 308, *cert. denied, Smith v. Georgia*, 429 U.S. 932, 97 S.Ct. 339, 50 L.Ed.2d 302 (1976), *rehearing denied*, 429 U.S. 1055, 97 S.Ct. 771, 50 L.Ed.2d 772 (1977). The Bibb County Superior Court denied Machetti's petition for declaratory relief and/or a new presentence hearing and for a stay of execution. After staying her execution pending appeal, the Supreme Court of Georgia denied the appeal and a motion for rehearing. *Smith v. State*, 238 Ga. 655, 235 S.E.2d 375, *cert. denied, Smith v. Georgia*, 434 U.S. 878, 98 S.Ct. 232, 54 L.Ed.2d 159, *rehearing denied*, 434 U.S. 961, 98 S.Ct. 496, 54 L.Ed.2d 323 (1977). Georgia's high court then issued remittitur to the Bibb County Superior Court, which slated January 20, 1978, as the date of Machetti's execution. She then filed a habeas corpus petition in the Superior Court of Baldwin County, Georgia, which stayed the execution but later denied the petition. In July, 1979, the Georgia Supreme Court denied her application for a certification of probable cause to appeal and denied her motion for reconsideration.

After exhausting her state remedies, Machetti filed a petition for writ of habeas corpus in January, 1978, in the district court for the Middle District of Georgia. That court stayed her execution "until such time as her action has been finally decided in the courts of the United States." After reference to a magistrate, the district court

denied Machetti's petition. *Machetti v. Linahan*, 517 F.Supp. 1076 (M.D.Ga.1981).

Machetti was convicted on February 28, 1975, of two counts of murder in the brutal slaying of her ex-husband, Joseph Ronald Akins, and his wife, Juanita. Machetti planned the murder so that her three teenage daughters might receive the benefits of their father's insurance policies. At the sentencing hearing, Machetti's attorney introduced no new evidence but begged the jury to find mitigating factors without suggesting any such circumstances. The jury recommended death on both counts, and the court sentenced Machetti to two consecutive death sentences.

Evidence received at the state habeas hearing showed that the traverse jury list from which Machetti's jury was drawn was composed of only 18% women, despite a 1970 census showing that women comprised 54% of Bibb County's adult population.[1] The grand jury list contained only 12% women. Thus, the absolute disparity between the adult female population of Bibb County and the grand jury list was 42%, and 36% with respect to the traverse jury list.[2] Appellee, L. Q. Linahan, Warden of the Georgia Women's Correctional Institution, concedes the accuracy of these statistics. At the time of jury selection, Ga.Code Ann. § 59-124 (repealed 1975) provided that any woman who did not wish to serve on a jury could "opt-out" merely by sending written notice to the

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[1] Appellant was convicted and sentenced by a twelve-member petit jury which included one woman.

[2] Absolute disparity is one method used to calculate disparity. Absolute disparity measures representativeness by the difference between the proportion of the population and the proportion of the underrepresented category in the jury box. Kairys, Kadane & Lehoczky, *Jury*

jury commissioners.[3] Potential women jurors in Bibb County automatically received cards allowing them the opportunity to exempt themselves from service.

II. ISSUE

We must decide whether appellant was indicted and convicted by juries drawn from a venire which unconstitutionally excluded and underrepresented women.

III. JURY COMPOSITION

[1, 2] Machetti's counsel first raised the jury composition issue at the state habeas corpus hearing.[4] She contends that the operation of section 59-124 systematically excluded women from the venire; and therefore, she was indicted by a grand jury and convicted by a traverse jury drawn from jury boxes in which women were unfairly underrepresented. Machetti thus contends that the Georgia jury selection procedure deprived her of her right to

Representativeness: A Mandate for Multiple Source Lists, 65 Cal.L. Rev. 776, 790 (1977).

[3] Ga.Code Ann. § 59-124 (1965) (repealed 1975) provided:

Exemption of women who do not desire to serve.—Any woman of this State who does not desire to serve upon juries shall notify the jury commissioners of the county in which she resides in writing to that effect, and thereupon the jury commissioners shall not place the name of such woman in the jury box for said county. 1953 Ga. Laws Nov.Sess., pp. 284, 288 (repealed 1975).

[4] Generally, a federal court will honor a valid state procedural rule that a defendant's failure to object to a grand or petit jury before or during trial constitutes waiver of that objection as a basis for habeas corpus relief. *Francis v. Henderson*, 425 U.S. 536, 541-42, 96 S.Ct. 1708, 1711, 48 L.Ed.2d 149 (1976); *Stewart v. Ricketts*, 451 F.Supp. 911, 913-14 (M.D.Ga.1978). A Georgia decisional rule in force at the time of appellant's trial in February and March, 1975, mandated that result. Where, however, the state habeas court entertains the federal constitutional claims on the merits, as in the instant case, the federal habeas court must also adjudicate the merits. *Lefkowitz v. Newsome*, 420 U.S. 283, 292 n.9, 95 S.Ct. 886, 891 n.9, 43 L.Ed.2d 196 (1975); *Newman v. Henderson*, 539 F.2d 502, 504 (5th Cir. 1976).

a fair trial by jury of a representative segment of the community. The district court upheld the selection process.

[3] Fundamental to our system of justice is the principle that the sixth amendment grants criminal defendants the right to an impartial jury. This guarantee also embraces a right that grand and petit juries be selected at random so as to represent a fair cross-section of the community. *Taylor v. Louisiana*, 419 U.S. 522, 527-30, 95 S.Ct. 692, 696, 42 L.Ed.2d 690 (1975); *United States v. Perez-Hernandez*, 672 F.2d 1380, at 1384 (11th Cir. 1982). Also relevant to our inquiry is the notion that

> the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of a difference. Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded.

Ballard v. United States, 329 U.S. 187, 193-94, 67 S.Ct. 261, 264, 91 L.Ed. 181 (1946) (footnote omitted). Moreover, as the Supreme Court more recently stated, "[w]hen any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable." *Peters v. Kiff*, 407 U.S. 493, 503, 92 S.Ct. 2163, 2169, 33 L.Ed.2d 83 (1972).

In *Taylor*, the Supreme Court held unconstitutional a state "opt-in" statute which automatically excluded women from the jury list unless they chose to be included by filing a written request for jury service. *Taylor* estab-

lished that the "jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." 419 U.S. at 538, 95 S.Ct. at 702, *quoted in Smith v. Balkcom*, 660 F.2d 573 (5th Cir. 1981). In contrast to the statute involved in *Taylor*, Ga.Code Ann. § 59-124 was an "opt-out" statute that automatically included women unless they opted not to serve. The Georgia legislature repealed this statute shortly after the Court decided *Taylor*.

In January, 1979, one year after the filing of Machetti's federal habeas corpus petition, the Supreme Court in *Duren v. Missouri*, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979), held unconstitutional a state opt-out statute which also exempted women from jury service on request. In setting forth the elements of a prima facie violation of the fair cross-section requirement, the Court required the defendant to show

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

439 U.S. at 364, 99 S.Ct. at 668.

In this case, the magistrate suggested that Machetti met the first two criteria required by *Duren*. The magistrate further suggested, however, that Machetti failed to satisfy the third requirement of establishing that the underrepresentation of women was due to their systematic exclusion in the jury selection process. Nevertheless, the magistrate stated that the operation of Georgia's opt-out

statute caused the disproportionate representation of women in Machetti's case. The magistrate suggested that Machetti had failed to satisfy the third prong because it was not until 1979 that the Supreme Court in *Duren* declared that states could not constitutionally permit all women to opt out from jury duty solely on the basis of sex. He thereby implied that the *Duren* holding that Missouri's opt-out statute constituted "systematic exclusion" was not retroactive. Alternatively, we read this finding to assume that the opt-out statute alone is insufficient prima facie evidence of systematic underrepresentation. The magistrate thus stated that Machetti failed to present any other evidence establishing that the sexual imbalance in Bibb County's venire was due to systematic exclusion of women in the jury selection process.

The district court held that *Duren* could not be applied retroactively on collateral review and that Machetti was therefore not entitled to relief. The court noted that because *Duren* is not applicable to Machetti's collateral attack, that it was not necessary for the magistrate to consider whether the circumstances of this case satisfied the *Duren* requirements. Although declining to adopt the magistrate's recommendations on this issue, the district court adopted the magistrate's suggestion that Machetti failed to show that anything other than Georgia's opt-out statute contributed to the underrepresentation of women on the jury list. The court thus implicitly acknowledged that Machetti demonstrated that section 59-124 caused the unconstitutional exclusion of women.

Machetti argues that the district court erred because *Duren*, decided some four years after her trial, must be applied retroactively to her case. In *Lee v. Missouri*, 439 U.S. 461, 99 S.Ct. 710, 58 L.Ed.2d 736 (1979) (per

curiam), the Supreme Court held that *Duren* is retroactively applicable to a jury sworn after the decision in *Taylor* because *Duren* did not establish any new principles of constitutional law not already settled by *Taylor*. 439 U.S. at 462, 99 S.Ct. at 711. Appellee concedes that *Lee* requires the retroactive application of *Duren* to this collateral attack. Appellee, however, requests this court to remand the instant case to the district court for consideration of whether the facts herein meet the three-prong test of *Duren*.

We find no just reason for a remand under the present circumstances. Machetti has remained on death row for seven years pending the resolution of these legal proceedings. Appellee has admitted that no questions of fact remain, that no additional relevant factual evidence exists, that no evidence controverts the facts established by Machetti, and that the statistics presented are accurate. The only questions remaining are whether, as a matter of law, the disparity herein violates the sixth amendment and whether the operation of Ga.Code Ann. § 59-124 constituted "systematic exclusion." We thus examine whether, as a matter of law, Machetti established a prima facie fair cross-section claim based on the exclusion of women.

[4-6] It is undisputed that women are a recognizable, distinct class under the first element of the prima facie case. There is no doubt that the relevant statistics satisfy the second criteria of unfair underrepresentation. The absolute disparity between the percentage women in the general adult population (54%) and on the 1975 petit jury list (18%) is 36%, whereas a 42% disparity existed with respect to the percentage of women on the grand jury list (12%).[5] The Supreme Court has never fashioned

[5] Although the census figures relied on were five years old at the time of appellant's trial, the Supreme Court has previously accepted

precise mathematical standards for gauging systematic exclusion. *See Alexander v. Louisiana*, 405 U.S. 625, 630, 92 S.Ct. 1221, 1225, 31 L.Ed.2d 536 (1972). Nevertheless, Supreme Court and Fifth Circuit precedent provide some guidance as to the magnitude of disparity needed to establish a prima facie cross-section claim. The variance here is sufficiently disproportionate to fall within the approximate boundaries delineated in cases holding that the statistical disparities established prima facie violations.[6] *See, e.g., Duren*, 439 U.S. at 360, 99 S.Ct. at 666 (38%); *Turner v. Fouche*, 396 U.S. 346, 90 S.Ct. 532, 24 L.Ed.2d 567 (1970) (23%); *Hernandez v. Texas*, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866 (1954) (14%); *Porter v. Freeman*, 577 F.2d 329 (5th Cir. 1978) (20.4%); *Preston*

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six-year-old data as adequate proof of the percentage of the distinctive class in the community. *Duren v. Missouri*, 439 U.S. 357, 365 & n.24, 99 S.Ct. 664, 669 & n.24, 58 L.Ed.2d 579 (1979); *Alexander v. Louisiana*, 405 U.S. 625, 627, 92 S.Ct. 1221, 1223, 31 L.Ed.2d 536 (1972). Furthermore, no evidence exists in the record to indicate that the 1970 census data "significantly distorted" the percentage of women in Bibb County at the time of trial so that the figures were of questionable relevance. *Duren*, 439 U.S. at 357, 99 S.Ct. at 664, 58 L.Ed2d 579.

[6] Some of the cases relied on for establishing the benchmark percentages to raise a prima facie claim of discrimination in jury selection involved equal protection challenges. The standard for proving a prima facie violation is virtually identical under both the fair cross-section and equal protection analyses. *United States v. Perez-Hernandez*, 672 F.2d 1380, at 1384 n.5 (11th Cir. Apr. 15, 1982).

Different evidence, however, is relevant to rebutting each challenge. A prima facie case of an equal protection violation may be rebutted by proving an absence of discriminatory purpose or that such purpose did not have a determinative effect. *Castaneda v. Partida*, 430 U.S. 482, 493-95, 97 S.Ct. 1272, 1279-1280, 51 L.Ed.2d 498 (1977). Discriminatory purpose is irrelevant to a fair cross-section claim which focuses solely on the composition of the venire. Since systematic disproportion alone establishes a prima facie cross-section claim, the rebuttal evidence focuses on the significant state interest which justifies the imbalance. *Duren v. Missouri*, 439 U.S. at 367-68 & n.26, 99 S.Ct. at 670-671 & n.26.

v. Mandeville, 428 F.2d 1392 (5th Cir. 1970) (13.3%). We hold that appellant's statistical evidence constituted an adequate prima facie showing for the purpose of establishing a fair cross-section violation.

As to the third requirement, the magistrate's recommendation stated that Machetti failed to establish that the underrepresentation of women in the final pool was due to their systematic exclusion in the jury selection process. As noted above, the magistrate impliedly based this finding on the erroneous premise that the declaration in *Duren* that states could not constitutionally permit all women to opt out from jury duty solely on the basis of sex did not apply to this case. The magistrate conducted a *Duren* analysis, yet refused to apply its holding on the ground that *Duren* is not retroactively applicable. The magistrate also distinguished *Taylor*, decided one month prior to appellant's trial, which involved a statute that automatically excluded women from jury lists because they failed to opt-in whereas this case involved an opt-out statute, as in *Duren*. *Lee*, however, indicates that *Duren* merely clarified *Taylor* and that the constitutional standards enunciated in *Taylor* retroactively apply here, even though *Duren* was decided approximately four years after Machetti's jury trial.

Moreover, the magistrate explicitly found that "[*t*]*here can be no doubt* that the underrepresentation of women in [Machetti's] case was caused by Ga.Code Ann. § 59-124." In stating that the magistrate need not have decided the constitutionality of the jury composition under *Duren* because it was not retroactively applicable to this collateral attack, the district court never repudiated this proposed finding. In fact, the court implicitly agreed that Machetti met the third-prong in *Duren* by adopting the portion of the magistrate's proposed finding that Ma-

chetti "failed to show that anything other than Ga.Code Ann. § 59-124 contributed to the underrepresentation of women in said jury boxes." 519 F.Supp. at 1080. Not only did the district court agree that the disparity resulted solely from the operation of Georgia's opt-out statute, but at oral argument appellee concurred in this view, conceding that no further evidence exists of the cause of the disproportionate representation of women.

[7, 8] We hold that the Machetti's proof sufficiently established that the underrepresentation of women resulted from their systematic exclusion in Georgia's jury selection procedure. Her undisputed showing that this significant disparity occurred over a period of twenty months, from February, 1974, through September, 1975, unmistakably indicates that the cause of the imbalance was inherent in the jury selection procedure under Ga. Code Ann. § 59-124. *Duren* established that the existence of an opt-out system, as embodied by statute, in conjunction with the resulting disproportionate and consistent exclusion of women from the final jury pool was prima facie evidence of systematic exclusion of women. 439 U.S. at 366-67, 99 S.Ct. at 669-70. Moreover, appellee introduced no evidence to rebut Machetti's case. We therefore conclude that the Georgia jury-selection system in effect at the time of Machetti's trial deprived her of her sixth and fourteenth amendment right to an impartial jury trial.

Because the jury composition issue is dispositive, we need not reach the additional issues presented.[7]

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[7] Machetti has also presented issues involving the effective assistance of counsel at the sentencing phase; the validity of Georgia's death penalty statute as applied to appellant; and whether the death penalty was applied arbitrarily and discriminatory on the grounds of race and poverty.

IV. CONCLUSION

We do not establish absolute limits on jury composition which would automatically authorize finding a constitutional violation. We merely hold that the percentage of women on the Bibb County jury lists should more closely approximate the percentage of women in the adult community and that 36% and 42% absolute disparities resulting from the operation of Georgia's opt-out statute are unconstitutionally excessive. We therefore reverse and remand to the district court with directions to issue the writ of habeas corpus.

REVERSED AND REMANDED WITH DIRECTIONS.

[Filed at 11:20 A.M., June 29, 1981, Helen F. Newberry, Deputy Clerk, U.S. District Court, Middle District of Georgia.]

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA MACON DIVISION

REBECCA A. MACHETTI, a/k/a REBECCA A. SMITH, *Petitioner,* vs. L. Q. LINAHAN, Warden, Georgia Women's Correctional Institution, *Respondent.*	CIVIL ACTION NO. 79-210-MAC

OWENS, District Judge:

Petitioner seeks federal habeas corpus relief under 28 U.S.C.A. § 2254 (1977). She requests that this court grant a writ of habeas corpus or, in the alternative, hold a full evidentiary hearing on all issues which she has presented and then grant a writ of habeas corpus.

This case has been under consideration in one form or another by state and federal courts in excess of a total of six years. Petitioner was convicted of two counts of murder in the Superior Court of Bibb County on March 1, 1975. Following a jury trial she received two consecutive death sentences. On direct appeal her sentences and convictions were affirmed by the Georgia Supreme Court. *Smith* v. *State*, 236 Ga. 12 (1976), *cert. denied*, *Smith* v. *Georgia*, 429 U.S. 932 (1976). A petition for rehearing was denied on January 10, 1977. On January 13, 1977, petitioner filed a petition for a declaratory judgment and/or presentence hearing and stay of execution in the Bibb County Superior Court. This petition was denied, and the denial was affirmed by the Supreme Court of Georgia. *Smith* v. *State*, 238 Ga. 655 (1977), *cert. denied*, 428

U.S. 910 (1977), *rehearing denied*, 429 U.S. 87 (1977). Petitioner, on January 9, 1979, then filed a petition for a writ of habeas corpus in the Superior Court of Baldwin County, Georgia. After a two-day hearing that petition was denied on May 9, 1979. A notice of appeal was filed by petitioner on May 30, 1979. Her application for a certificate of probable cause to appeal was denied by the Supreme Court of Georgia on July 10, 1979, and a motion for reconsideration was denied by that court on July 17, 1979. The petition under consideration was filed in this court on August 30, 1979, and referred to the United States Magistrate who issued proposed findings of fact and conclusions of law on March 24, 1981. Thereafter petitioner filed her objections to those proposed findings of fact and conclusions of law.

The record before this court among other things contains transcripts of the petitioner's trial (over 1,200 pages) and state habeas corpus hearing (over 300 pages); a ninety-two-page order of the Honorable Joseph B. Duke denying petitioner's state habeas petition; various depositions and affidavits offered by petitioner as supportive of her contentions; over 1,200 pages of a transcript of an evidentiary hearing in *People* v. *Moore;* and, briefs of the parties regarding the instant petition.

This court has carefully considered each contention made by the petitioner. The record has been scrutinized to determine if any of the elements of § 2254(d) [1] which

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[1] 28 U.S.C. § 2254(d) provides:

In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof where parties, evidenced by a

would overcome the statutory presumption of correctness accorded the state court determination and entitle petitioner to a hearing exists. The court has been unable to find anything which would warrant such a hearing. Upon review of the petition, the record before the court, and the report of the United States Magistrate, the court finds that the allegations of deprivation of constitutional rights contained in the petition are of no merit.

Except for the Magistrate's suggestions as to whether petitioner established a prima facie case of unconstitutional jury box composition as delineated by the Supreme Court of the United States in *Duren* v. *Missouri*, 439 U.S. 357 (1979), this court approves and adopts the Magis-

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written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.

trate's proposed findings of fact and conclusions of law in their entirety. The court makes the following additional comments and findings as to the issues of (1) ineffective assistance of counsel, (2) jury box composition, and (3) application of the death penalty.

(1) **Ineffective Assistance of Counsel**

Petitioner contends in her objections to the "Proposed Findings of Fact and Conclusions of Law" of the United States Magistrate (Objections) that the state habeas court's decision as to the effectiveness of her counsel was based on an invalid standard, and thus must be reconsidered in the light of a recent United States Supreme Court case establishing the standard to be used in determining whether there was effective assistance of counsel. Specifically, petitioner contends that the state habeas court used the old standard which made a distinction between retained and appointed counsel, with retained counsel being subject to a *less* stringent standard. In *Cuyler* v. *Sullivan*, 446.U.S. 335 (1980) the Supreme Court stated that the use of different standards depending on whether counsel was retained or appointed is improper; retained counsel should be subject to as stringent a standard as appointed counsel. As petitioner has noted, this standard has since been utilized by the Fifth Circuit in *Kemp* v. *Leggett*, 635 F.2d 453 (5th Cir. 1981) (Objections p. 12).

Even assuming that *Cuyler* applies retroactively to this case, a careful reading of Judge Duke's order in the state habeas proceeding shows that his decision as to the effectiveness of petitioner's counsel was not based on the improper dual standard. It is true that Judge Duke referred to the dual standard which he stated was found in federal decisions. His decision however did not rest on these cases or on the now disapproved of less stringent standard

for retained counsel. Prior to making reference to this practice in the federal courts, Judge Duke cited *Pitts* v. *Glass*, 231 Ga. 638, 203 S.E.2d 515 (1974) as delineating the standard in Georgia for determining the effective assistance of counsel ("counsel reasonably likely to render and rendering reasonably effective assistance"). He then stated that the "Fifth Circuit Court of Appeals in *MacKenna* v. *Ellis*, 286 F.2d 592, 599 (5th Cir. 1970), interpreted this standard more fully to mean 'not errorless counsel and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance.' " (Order of Judge Duke at p.51). *Both* of these Fifth Circuit cases dealt with *appointed* counsel, *not* retained counsel. As explained *supra*, under the old dual system the standard for determining the effectiveness for appointed counsel was more stringent than that for retained counsel. Consequently, by citing *Pitts* and *MacKenna* as the applicable standard for determining whether petitioner had effective assistance of counsel, Judge Duke applied the harder "appointed counsel" standard to Mr. Hawkins, even though Mr. Hawkins was *not* appointed. If anything, this would tend to militate in petitioner's favor; thus, there can be no inference that Mr. Hawkins "got off easy" by being judged effective under a dual system subsequently discredited by the Supreme Court of the United States.

(2) **Jury Composition**

Petitioner alleged in Paragraph 90-92 of her petition that she was indicted and convicted by grand and traverse juries drawn from jury boxes from which women were unconstitutionally excluded. The Magistrate suggests that there is no merit to these claims. In her objections petitioner contends that she was deprived of constitutionally

adequate representation in said jury boxes of her peers—women—because of a state statute allowing women to opt out of jury service; she says that statutory procedure was a "clear denial of Basic Due Process rights and the right to a trial by a representative jury." According to petitioner, the fact that the relevant statute (Georgia Code Ann. § 59-124, Repealed by Acts 1975, pp. 779, 780) was not attacked prior to the U. S. Supreme Court decision in *Duren* v. *Missouri*, 439 U.S. 357 (1979) does not make that statute any less unconstitutional as to her and said jury boxes. Finally, petitioner contends that *Duren* "merely clarified" *Taylor* v. *Louisiana*, 419 U.S. 522 (1975).

In considering petitioner's contention as to the composition of the jury boxes—as far as women are concerned—it is important to look at the chronology of events from 1975 to the present: In January of 1975, the United States Supreme Court in *Taylor* held that a statute automatically *excluding* women from jury service unless they *opted* to be included by filing a written request for jury service, was unconstitutional. In February 1975, petitioner was tried and convicted, and on March 1, 1975, she was sentenced to death. Georgia Code Ann. § 59-124 was repealed by Acts 1975, pp. 779, 780. After exhausting her avenues of direct appeal, petitioner on January 9, 1978, filed a petition for writ of habeas corpus in the Superior Court of Baldwin County. On January 9, 1979, the United States Supreme Court in *Duren* decided that a state statute which allowed women by request to *opt out* of jury service was unconstitutional.

As suggested by the Magistrate, *Taylor*—although decided before this case came to trial—is not applicable because it does not reach the question at issue here. The

statute struck down in *Taylor* was an "opt-in" statute; *i.e.* women were automatically *excluded* from the jury list unless they opted to serve. Georgia Code Ann. § 59-124, was an "opt-out" statute, meaning that women were automatically *included* unless they opted *not* to serve. It is this "opt-out" type of statute which was held unconstitutional in *Duren*. Consequently, the issue presented here is whether *Duren*, decided approximately four years after petitioner's trial, will be applied retroactively to her case.

In determining whether or not *Duren* should be applied retroactively to this case, the court need only look to a case decided by the Supreme Court six days after *Duren*. In *Harlin* v. *Missouri*, 439 U.S. 459, 58 L.Ed.2d 733, 99 S.Ct. 709 (1979) a case involving a statute like Ga. Code Ann. § 59-124, Justice Powell in his opinion concurring in the judgment expressed the view that the wisest approach in fashioning a satisfactory retroactivity doctrine "contemplates . . . that courts apply a new rule retroactively in cases still pending on direct review, whereas cases on collateral review ordinarily would be considered in light of the rule as it stood when the conviction became final." 439 U.S. at 460 (citation omitted).

In the present case the "new rule" is the *Duren* decision, which rendered invalid opt-out statutes like Ga. Code Ann. § 59-124. It would apply to petitioner's case if her case was "still pending on *direct* review." (emphasis added). However, there can be no argument that petitioner's case is before this court on *collateral* review, and it was in that posture at the time the "new rule" (*Duren*) was made. As a result it must be considered "in light of the rule as it stood when the conviction became final." 439 U.S. at 460. When petitioner's conviction became final the rule was that although "opt-in" statutes were

unconstitutional, "opt-out" statutes were constitutionally sound.

Because *Duren* is not applicable to petitioner's case it was not necessary for the Magistrate to consider whether or not the three elements of a prima facie case established by *Duren* had been met. This court is in agreement with and adopts the remainder of the Magistrate's proposed findings as to this contention, including the finding that petitioner has failed to show that anything other than Georgia Code Ann. § 59-124 contributed to the under-representation of women in said jury boxes.

(3) Application of the Death Penalty

In his proposed findings and conclusions the Magistrate recommended that petitioner's claims that the death penalty as applied in her case is unconstitutional be denied. Petitioner now contends that the Magistrate mistakenly relied on *Spinkellink* v. *Wainwright*, 578 F.2d 582 (5th Cir. 1978). Petitioner claims that "[t]hat case is no longer good law but has been effectively overruled by *Godfrey* v. *Georgia*, 446 U.S. 420 (1980)" which, according to petitioner, "entirely destroys the legal premise upon which *Spinkellink* was based." A reading of both of these cases does *not* call for the conclusion demanded by the petitioner. *Spinkellink* is obviously in harmony with *Godfrey* and consequently remains good law.

Other Contentions

On Pages 28 and 29 of her objections to the proposed findings and conclusions petitioner lists five contentions which she claims the Magistrate failed to address "to any meaningful degree" to wit: (1) the death sentence is unconstitutionally cruel and unusual punishment as applied

to her, a co-conspirator non-trigger person in Florida at the time of the killings; (2) petitioner's consititutional rights were violated by a conviction-prone jury; (3) petitioner's constitutional rights were violated in that she did not receive a noncapricious sentencing process; (4) petitioner received the death penalty in a manner which discriminated on the basis of race, geography, and poverty; and (5) the jury which convicted and sentenced petitioner did not believe that she would be executed.

After reading the record of the proceedings below, and after considering petitioner's brief as to these contentions, this court is convinced that these contentions are not accurate statements of what occurred in her conviction and sentencing proceedings, and that they are without possible merit. At best they are arguments pertaining to matters not found in this record.

Based upon the proposed findings of fact and conclusions of law of the Magistrate which are adopted by this court, and upon the considerations and determinations above-stated, the court concludes that petitioner is entitled to neither an evidentiary hearing nor to a writ of habeas corpus.

Accordingly, Rebecca A. Machetti's petition for habeas corpus relief is hereby DENIED IN ITS ENTIRETY.

SO ORDERED, this 26th day of June, 1981.

/s/ WILBUR D. OWENS, JR.
WILBUR D. OWENS, JR.
United States District Judge

[Filed at 11:45 A.M., June 29, 1981.
Helen F. Newberry, Deputy Clerk, U.S. District Court, Middle District of Georgia]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF GEORGIA MACON DIVISION

REBECCA A. MACHETTI, a/k/a REBECCA A. SMITH, *Petitioner,* vs. L. Q. LINAHAN, Warden, Georgia Women's Correctional Institution, *Respondent.*	CIVIL ACTION NO. 79-210-MAC

JUDGMENT

Pursuant to the Opinion and Order of this Court dated June 26, 1981 and filed June 29, 1981, and for the reasons stated therein, the petition for a writ of habeas corpus of REBECCA A. MACHETTI, a/k/a REBECCA A. SMITH, is denied in its entirety.

This 29th day of June, 1981.

GIRARD W. HAWKINS, Clerk

By: /s/ HELEN F. NEWBERRY
HELEN F. NEWBERRY
Deputy Clerk

IN THE SUPERIOR COURT FOR THE COUNTY OF BALDWIN, STATE OF GEORGIA.

REBECCA A. SMITH a/k/a REBECCA A. MACHETTI, *Petitioner.* v. HAROLD L. HURLEY, Acting Warden, Georgia Women's Correctional Institution, *Respondent.*	Civil Action File No. 13548. Habeas Corpus.

ORDER

The above styled case came on for hearing on February 1, 1978, and March 1, 1978, in the Superior Court of Baldwin County, Georgia. Upon consideration of the petition and evidence presented, it appears as follows:

FINDINGS OF FACT

The Petitioner, Rebecca A. Smith, a/k/a Rebecca A. Machetti, is presently incarcerated in Georgia Women's Correctional Institution in Milledgeville, Georgia. On March 1, 1975, the Petitioner was sentenced to death following her conviction for the murders of Joseph Arnold Akins and Juanita Knight Akins, in the Superior Court of Bibb County, Georgia, by Judge C. Cloud Morgan.

The Petitioner appealed her conviction to the Supreme Court of Georgia. On January 6, 1976, the Supreme Court of Georgia affirmed the convictions of the Petitioner in Smith v. The State, 236 Ga. 12 (222 S.E. 2d 308) (1976).

The Petitioner filed for a writ of certiorari in the United States Supreme Court on September 11, 1976. On November 1, 1976, the United States Supreme Court denied the Petitioner's petition for writ of certiorari in Smith v. Georgia, ___U.S.___, 97 S.Ct. 339. On January 10,

1977, the United States Supreme Court in Smith v. Georgia, ___U.S.___, 97 S.Ct. 771, denied Petitioner's petition for re-hearing.

On January 13, 1977, the Petitioner petitioned the Superior Court of Bibb County, Georgia, for a declaratory judgment and/or a pre-sentence hearing and a stay of execution. The Superior Court of Bibb County, Georgia, denied the petition. The Petitioner then appealed this decision to the Supreme Court of Georgia, which stayed the Petitioner's execution pending appeal. The Supreme Court of Georgia denied the Petitioner's appeal on April 7, 1977, and denied the motion for re-hearing in Smith v. The State, 238 Ga. 655 (235 S.E. 2d 3751).

On July 15, 1977, the Petitioner filed a petition for writ of certiorari in the Supreme Court of the United States. On October 3rd, 1977, the United States Supreme Court denied the petition for writ of certiorari in the case of Smith v. Georgia, ___U.S.___, 98 S. Ct. 232. On November 14, 1977, the United States Supreme Court further denied Petitioner's petition for re-hearing in the case of Smith v. Georgia, ___U.S.___ 98, S. Ct. 496.

On January 9, 1978, the Petitioner filed in this Court a petition for writ of habeas corpus. The Respondent, Harold L. Hurley, Acting Warden, Georgia Women's Correctional Institution, was duly served on January 11, 1978. The Respondent filed his answer in this Court on February 1, 1978.

Remittitur in Petitioner's case was issued to the Superior Court of Bibb County on December 2, 1977, and filed on January 4, 1978. Petitioner's execution was set for January 20, 1978.

On January 9, 1978, this Court issued an order staying the execution of the Petitioner, Rebecca A. Smith a/k/a

Rebecca A. Machetti, which stated: "On application for a stay of execution of the sentence of death imposed upon the Petitioner by the Superior Court of Bibb County, Georgia, and scheduled to be carried out at the Georgia State Prison on January 20, 1978, it is hereby ordered, that the application for a stay is hereby granted, and the Petitioner's execution scheduled for January 20, 1978, is hereby stayed until further order of this Court. It is further ordered that the Clerk shall give immediate notice by telephone and by telegraph to the Respondent Warden, and to the Attorney General of the State of Georgia, that the Petitioner's execution is stayed by the order of this Court."

On February 1, 1978, a hearing was held in this Court concerning the Petitioner's motions for appointment of experts authorized for investigation, and continuance, and motion for costs and expenses to pursue habeas corpus relief. On February 8th, 1978, nunc pro tunc as of February 1, 1978, this Court denied the Petitioner's motion for appointment of experts authorized for investigation, and motion for costs and expenses necessary to pursue habeas corpus relief. However, this Court did grant on February 8, 1978, nunc pro tunc as of February 1, 1978, Petitioner's motion for a continuance, and it was ordered that the petition for writ of habeas corpus be heard on March 2nd, 1978, in this Court.

After the hearing on March 2, 1978, the matter was taken under advisement. Counsel of Record for Petitioner and Respondent requested time to submit argument by briefs after the transcript of the hearing had been completed, which was accomplished and filed on April 3, 1978, in the Office of the Clerk of the Superior Court of Bald-

win County, Georgia. A Post-Hearing Brief on behalf of Petitioner was filed on or about May 31, 1978. Thereafter An Additional or Supplemental Post-Hearing Brief on behalf of Petitioner on recent decisions of Lockett and Bell was filed on July 10, 1978, and no Response Brief on behalf of Respondent was filed thereto.

As stated, the Court agreed to take the case under advisement and has since been delayed in completing and filing this order due to heavy caseload and trial docket of the Courts in this multi-county Circuit, and also due

* * * * *

It appears to this Court that the provisions of 27-2518, *supra*, will require the setting of a new date within the time limits therein provided once all of the appeal, habeas corpus and other remedies have been exhausted. It appears to this Court that the execution was not carried out on the 15th day following receipt in the trial court of the remittitur from the Supreme Court of Georgia, and that this is at this point, a moot allegation. A moot case is one that seeks to determine an abstract question, which does not arise upon existing facts and rights. Byrd v. Equitable Life Assurance Society, 185 Ga. 628 (196 S. E. 63). Therefore, this contention of the Petitioner is moot, and without merit.

XI.

The next issue raised by Petitioner is that the imposition and execution of Petitioner's death sentences violates the Sixth and Fourteenth Amendments to the Constitution of the United States and Art. I, Sec I, Paragraphs I, XI, and XI of the Constitution of the State of Georgia, by denying her trial by representative way. The Petitioner alleges that she was deprived of her fundamental right to

indictment and trial by a jury selected from a representative cross-section of the community, and the failure of her trial counsel to object to the composition of the traverse or grand jury pools deprived her of her right to the effective assistance of counsel. In her petition for writ of habeas corpus the Petitioner alleges the following facts: (1) The sentences were imposed pursuant to the verdict of a jury selected through procedures that systematically excluded from jury service all persons having conscientious or religious scruples against capital punishment, without sufficient individualized examination of the beliefs of each particular excluded venireman; (2) The sentences were imposed pursuant to the verdict of a jury from which all persons having conscientious or religious scruples against capital punishment were systematically excluded, with the result that the jury did not constitute a representative cross-section of the community; (3) All persons having conscientious or religious scriples against capital punishment were systematically excluded from the jury which determined Petitioner's guilt or innocence, thereby depriving Petitioner of a vital constitutional right, her right to a jury selected from a representative cross-section of the community, without furthering any permissible state interest; (4) She was convicted and sentenced to die by a jury that did not reflect a representative cross-section of the community and was not impartial in fact, but was unrepresentative and biased in favor of the prosecution on the issue of Petitioner's guilt of the crimes with which she was charged; (5) Under Section 59-112 of the Georgia Code, women who are housewives with children 14 years of age or younger may be excused from jury duty merely by request; men in a similar status do not have a comparable right. The test which must be applied was set out by the Supreme Court of Georgia in Pass v. Caldwell, 231

Ga. 192 (1973) (200 S.E. 2d 720), which held: "It was held in United States v. Hyde, 448 F.2d 812, 824 that the defendant always has the burden of showing jury discrimination. Evidence of 'spectacular' underrepresentation meets the burden, making a prima facie case of discrimination. The burden of going forward then shifts to the government to explain the figures in a non-discriminatory way. The requirements for making out a prima facie case of jury discrimination are two fold. First, appellant must prove that an opportunity for discrimination on account of race existed on the grounds that the source from which the potential jurors was drawn was racially biased, and second, that the use of such an 'infected source' produced a significant disparity between the percentages of blacks found present in the source and those actually appearing on applicant's grand and petit jury panels." Also see: Whitus v. Georgia, 385 U.S. 545 (87 S.C. 643, 17 L.E. 2d 599); Wright v. Smith, 474 F. 2d 349, 351 (5th Cir. 1973); and Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed. 2d 690, in which the Supreme Court said: "It should be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement but that petit jury actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition. Foy v. United States, 342 U.S. 261, 284 (867 S.Ct. 1613, 1625, 91 L.Ed. 2d 2043) (1947); Apadaca v. Oregon, 406 U.S. at 414, 92 S.Ct. at 634 (Purality Opinion); but the jury rules, pools of names, panels, or venires from which the juries are drawn, does not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." The evidence presented at the habeas corpus hearing of the Pe-

titioner shows that the traverse jury was composed of the requisite twelve members, of whom one was a female, and three were black. Both Mr. Adam Greene, Clerk of the Superior Court of Bibb County at the time the jury utilized in the Petitioner's trial was established, and Mr. K. B. Hardwick, Jr., foreman of the jury commission who established the jury box utilized in Petitioner's trial, were present at the Petitioner's habeas corpus hearing and testified concerning the establishment of this jury box. The jury commission at the time was composed of six male jury commissioners, two of whom were black. The jury commission set forth steps to be used in revising the jury box in 1973 which was admitted into evidence at the habeas corpus hearing. Mr. K. B. Hardwick, Jr. testified at the habeas corpus hearing concerning the specific procedures utilized in compiling the grand and traverse juries. First, he testified that the names of prospective jurors from the outgoing box would be drawn and then from the voter registration list the commissioner would obtain as many names as possible and send out questionnaires for prospective jurors. In addition to the voter registration list, the jury commissioners also used personal knowledge, the city directory and telephone calls, to supplement this list and insure a representative cross-section. He stated that only the females that requested exclusion were eliminated from the jury list. In addition to other supplementation, the jury commission would make spot checks of the list to determine if blacks and females were represented in fair proportion. The five commissioners were divided in teams to compare the male-female and black-white ratio to see if the jury list was running in proper balance. Petitioner's Exhibit No. 3 reveals that in order to prove the black ratio, the following was done: "(a) The voter list was gone over for names of apparently qualified

blacks to whom questionnaires were sent but who did not return it: 'Setup' cards were made up and included. (b) Some 'borderline' whites were pulled." The evidence shows that the jury box in effect at the time of the Petitioner's trial was established on February 27, 1974. The evidence also shows that the entire traverse jury box was selected from the registered voters list, and that a survey of the number of blacks and women in the box was made only about three-fourths of the revision of the names. At the time of the survey, the box was composed of 19% blacks and 18% women. In 1970 census reported 34% blacks in Bibb County, and 54% of Bibb County's population was female. It appears to this Court from the testimony and evidence presented that the Petitioner has now shown that an opportunity for discrimination existed from the source of the jury list, and secondly, though they show some disparity between the percentages of blacks and women in the traverse and grand jury boxes and the percentages of blacks and women in the population, the Petitioner has not shown the significant disparity necessary for finding that a jury was non-representative. As to the ineffective assistance of counsel claim, it appears to this Court that since there was no illegality in the composition of the juries, Counsel was not ineffective in failing to challenge the juries as being non-representative. Therefore, this Court concludes from the testimony and evidence presented, that the contentions of the Petitioner are without merit.

XII.

The next contention raised by the Petitioner is that she was convicted on the basis of information obtained in violation of her privilege against self-incrimination under the Fifth and Fourteenth Amendments to the

Constitution of the United States, and Art. I, Sec. I, Paragraph XIII of the Constitution of the State of Georgia. The Petitioner contends: (1) Evidence was offered against the Defendant at the trial consisting of statements made by the Defendant to law enforcement officers; (2) The said statements of the Defendant to law enforcement officers were incriminatory as to the question of the existence of aggravating circumstances and to the question of guilt, in that statements were introduced regarding the Defendant's knowledge of the existence of certain insurance policies and statements were introduced regarding the Defendant's providing the officers with an alibi for persons accused of the actual act of killing; (3) The said statements were made involuntarily to the officers and without the proper warnings regarding the Constitutional rights of the Defendant with respect to self-incrimination and representation by counsel. This Court has made a thorough examination of this allegation of the Petitioner. From the testimony and evidence presented to this Court, this Court cannot find any violation of Petitioner's privilege against self-incrimination under the United States Constitution or the Constitution of Georgia. Therefore, the contention of the Petitioner is without merit.

After hearing all the evidence in this case, and based upon the findings of fact and conclusions of law in this order, this Court concludes that none of Petitioner's constitutional rights were violated and that Petitioner's conviction and death sentences are lawful and Petitioner is not being illegally held nor detained without proper authority.

THEREFORE, IT IS CONSIDERED, ORDERED, AND ADJUDGED, because of the above stated reasons,

that Petitioner's Motion for Writ of Habeas Corpus, be, and the same is hereby, denied, and Petitioner is remanded to the custody of Harold L. Hurley, Acting Warden, Georgia Women's Correctional Institution, Respondent, for further action appropriate to law.

It is further ORDERED that the stay of execution entered by this Court on January 9, 1978, is hereby dissolved, and that a copy of this order be served upon the Honorable C. Cloud Morgan, Judge, Superior Courts, Macon Judicial Circuit, and Honorable Donald Thompson, District Attorney, Macon Judicial Circuit.

SO ORDERED, this 9th day of May, 1979.

/s/ JOSEPH B. DUKE

JOSEPH B. DUKE
Judge, Superior Courts
Ocmulgee Judicial Circuit

82-965

NO. _____

Office - Supreme Court, U.S.
FILED
DEC 9 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

L. Q. LINAHAN, WARDEN,

Petitioner,

vs.

REBECCA A. MACHETTI
a/k/a REBECCA A. SMITH,

Respondent.

ON APPEAL FROM THE UNITED STATES COURT

OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When a state habeas court has chosen to hear fully and decide a claim of unconstitutional jury composition on its merits without objection by the warden, and a federal magistrate has found, without objection by the warden, that the state habeas court indeed determined the merits of such claim, do the decisions of this Court in Engle v. Isaac, ___ U.S. ___, 71 L.Ed. 2d 783 (1982) and United States v. Frady, ___ U.S. ___, 71 L.Ed. 2d 816 (1982) apply?

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RESPONSE IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The Warden's Petition is premised on three contentions: (1) that the state habeas court never reached the merits of Rebecca Machetti's claim of unconstitutional jury composition; (2) that Ms. Machetti's claim was therefore waived because it was not made at her original trial; and (3) that the district court never considered the claim in the light of Wainwright v. Sykes, 433 U.S. 72 (1977). As the following facts clearly show, these premises are false.

Respondent Machetti filed a petition for writ of habeas corpus in the Superior Court of Baldwin County, Georgia on January 9, 1978. In her petition she contended, inter alia, that she was indicted and tried by a jury which unconstitutionally excluded women. In Paragraph K she pleaded:

> K. The imposition and execution of Petitioner's death sentences violate the Sixth and Fourteenth Amendments to the Constitution of the United States and Art. I, Sec. I, ¶¶I, XI and XI of the Constitution of the State of Georgia by denying her trial by a representative [jury].
>
> *****
>
> (5) Under Section 59-112 of the Georgia Code, women who are housewives with children 14 years of age or younger may be excused from jury duty merely by request; men in a similar status do not have a comparable right.

(A copy of the petition is contained in the Appendix.)

The return and answer of the Warden at Paragraph 30 denied Ms. Machetti's allegation but did not raise any defense of waiver:

> Respondent denies that portion of the petition entitled paragraph K. in which Petitioner alleges that the imposition and execution of Petitioner's death sentences violate the Sixth and Fourteenth Amendments by denying her a trial by a representative [jury].

(A copy of the return and answer is contained in the Appendix.)

On February 16, 1978, Ms. Machetti amended her petition for writ of habeas corpus by alleging unconstitutional exclusion of both women and blacks from the grand and traverse juries:

> (6) Petitioner was indicted, convicted and sentenced to die by juries in which women and blacks were greatly underrepresented.

She also added four new paragraphs to her claim of ineffective assistance of counsel, including the allegation that her trial counsel had failed to object to the sex or race composition of the jury pools. (A copy of the amendment is contained in the Appendix.)

The supplemental return and response of the Warden again denied the allegations and did not mention waiver:

> Respondent admits that portion of the amendment to the petition entitled A.(25) in which the Petitioner states that her trial counsel failed to object to the sex or race composition of the grand or traverse jury pool, but denies that this resulted in the Petitioner receiving the ineffective assistance of counsel at trial.
>
> ******
>
> Respondent denies that portion of the amendment to the petition as subparagraph (6) to paragraph 9(k) in which the Petitioner states that she was indicted, convicted and sentenced to die by juries in which women and blacks were greatly underrepresented.

(A copy of the supplemental return and response is also contained in the Appendix.)

At the state habeas hearing on March 2-3, 1978, Ms. Machetti called as witnesses both the Clerk of the Superior Court of Bibb County, Georgia, and the Chairman of the Jury Commission. The warden made no objection to either witness on the basis of waiver, relevancy, or any other ground. Both were examined and cross-exmained in detail on the composition of the jury pool and methods of jury selection. In response to the Warden's objection to questions about the composition of previous jury pools in Bibb County, the court asked Ms. Machetti's counsel what she was trying to prove:

> [ASSISTANT ATTORNEY GENERAL SUSAN] BOLEYN: Your Honor, what is the relevance of the testimony as to the box before 1973?
>
> THE COURT: Ms. Oakley?
>
> MS. OAKLEY: We are trying to show exclusion, and I think we need to go back more than to the box we are talking about.

THE COURT: If that is what she is trying to prove. Is that alleged as one of the grounds in the petition?

MS. OAKLEY: It is alleged both as a separate ground and it is alleged as failure of counsel to challenge.

THE COURT: All right, you may proceed. I overrule the objection. [1]

Hearing T. 80-81 (Pages 80-81 of the state habeas hearing transcript are contained in the Appendix.) The Warden did not object further or seek a ruling limiting testimony to the issue of ineffective assistance of counsel.

The Order of May 9, 1979, denying the state habeas petition, is contained in its entirety in the Appendix. From page 8 to page 54 the superior court addressed the claim of ineffective assistance of counsel. Then, in a separate section, after discussing several other constitutional claims, the court turned to Ms. Machetti's allegation of unconstitutional jury composition on its merits:

> It appears to this Court from the testimony and evidence presented that [Ms. Machetti] has now shown that an opportunity for discrimination existed from the source of the jury list, and secondly, though they show some disparity between the per centages of blacks and women in the population, [Ms. Machetti] has not shown the significant disparity necessary for finding that a jury was non-representative. As to the ineffective assistance of counsel claim, it appears to this Court that since there was no illegality in the composition of the juries, Counsel was not ineffective in failing to challenge the juries as being non-representative. Therefore, this Court concludes from the testimony and evidence presented, that the contentions of [Ms. Machetti] are without merit.

Smith v. Hurley, No. 13548 (Super. Ct. Baldwin Co., Ga., Order of May 9, 1979, p. 91)(emphasis added).

When Ms. Machetti applied to the Supreme Court of Georgia for a certificate of probable cause to appeal, the Warden did not cross appeal.

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[1] It is obvious from this exchange that the Warden's objection related to the relevancy of evidence of earlier jury boxes rather than to any testimony on the merits of the claim.

In her federal habeas corpus petition filed August 29, 1979, Ms. Machetti alleged:

> 90. Petitioner was indicted, convicted, and sentenced to die by juries which excluded representative numbers of women and blacks, in violation of rights guaranteed to her by the Sixth and Fourteenth Amendments to the Constitution of the United States.
>
> Facts supporting Petitioner's claim that her constitutional rights were violated by a nonrepresentative jury.
>
> 91. Under Section 59-112 of the Georgia Code, women who are housewives with children 14 years of age or younger may be excused from jury duty merely by request; men in similar status do not have a comparable right, thus reducing the available number of women in the jury pools.
>
> 92. The grand and traverse jury pools from which came the grand and traverse juries which indicted, convicted and sentenced Petitioner were greatly under-representative of women and blacks.

The case was submitted to the magistrate for proposed findings of fact and conclusions of law. In his report and recommendations filed March 24, 1981, the magistrate dealt with the jury claim by first addressing the waiver issue:

> Petitioner's trial counsel failed to challenge the composition of the juries by motion and to produce evidence in support of the alleged discrimination prior to trial. No enumeration of error or evidence concerning unconstitutional jury selection procedures was thereafter presented on direct appeal to the Supreme Court of Georgia. It was not until the state habeas corpus proceeding that petitioner's appellate counsel raised the jury composition issue.
>
> At the time of petitioner's trial in February and March, 1975, the Georgia courts had established a decisional rule that a defendant's failure to object to the grand or traverse jury before or during trial waived that objection as a basis for habeas relief. Stewart v. Ricketts, 451 F.Supp. 911 (M.D. Ga. 1978). Normally federal courts should honor such a procedural rule by not allowing the convicted defendant to raise the jury claims in a federal habeas corpus proceeding. Francis v. Henderson, 425 U.S. 536 (1976). Where, however, the state habeas corpus court chose to litigate the merits of the grand and traverse jury issues despite the state imposed waiver, then a federal court must likewise examine the merits of the unlawful composition claim. Lefkowitz v. Newsome, 420 U.S. 283, 292 (1975); Newman v. Henderson, 539 F.2d 502 (5th Cir. 1976). In the instant case, the state habeas corpus court had before it petitioner's allegations of an unconstitutional grand and traverse jury and adjudicated the merits

> of the allegations against petitioner. Thus, this Court must address the same issues. Newman v. Henderson, supra.

Machetti v. Linahan, No. 79-210-MAC (M.D. Ga. March 24, 1981). (A copy of the proposed findings of fact and conclusions of law is found in the Appendix.) Then, proceeding to the merits of the case, the magistrate found that Ms. Machetti had shown under-representation of women in her jury pool because of Georgia Code §59-124, but refused to apply Duren v. Missouri, 439 U.S. 357 (1979) retroactively to the almost identical Georgia statute even though Ms. Machetti's trial commenced more than a month after this Court's decision in Taylor v. Louisiana, 419 U.S. 522 (1975).

Although required by Rule 8 of the Rules Governing Section 2254 Cases in the United States District Courys and 28 U.S.C. §626(b) to object to the findings and conclusions of the magistrate in order to preserve any objection to the magistrate's finding that the state court had reached the merits, the Warden did not object to anything.

The United States District Court for the Middle District of Georgia "approve[d] and adopt[ed] the Magistrate's proposed findings of fact and conclusions of law in their entirety" with the exception of "the Magistrate's suggestions as to whether [Ms. Machetti] established a prima facie case of unconstitutional jury box composition." Machetti v. Linahan, 517 F.Supp. 1976 (M.D. Ga. 1981). The district court ruled against Ms. Machetti on the merits of her claim, refusing to apply Duren v. Missouri, supra, retroactively.

Although Ms. Machetti appealed the district court's denial of relief, Warden Linahan did not cross-appeal from the district court's adoption of the magistrate's findings or otherwise.

The Court of Appeals for the Eleventh Circuit, after expressly noting that the district court had considered the waiver question,[2/] reversed the lower court's judgment with regard to jury composition. Machetti v. Linahan, 679 F.2d 236 (11th Cir. 1982). Rehearing was denied August 24, 1982.

[2/] Machetti v. Linahan, 679 F.2d 236, 238 n.4 (11th Cir. 1982).

REASONS FOR DENYING THE WRIT

BECAUSE THE STATE HABEAS COURT FULLY CONSIDERED AND ADJUDICATED RESPONDENT'S JURY COMPOSITION CLAIM ON ITS MERITS, THE DECISION OF THE COURT OF APPEALS WAS CORRECT AS A MATTER OF LAW.

More than four and one-half years after the state habeas evidentiary hearing, three and one-half years after the state habeas court's adjudication of Ms. Machetti's jury composition challenge on the merits, a year and one-half after the U.S. Magistrate concluded there was no waiver problem as a matter of law and the U.S. District Court adopted that conclusion, and after the Eleventh Circuit ruled in favor of Ms. Machetti, ordering that her conviction and death sentences should be vacated, Petitioner Linahan now suggests to this Court that the state habeas court did not really determine the issue on the merits. Petitioner's contention is patently untrue.

Although the state habeas court had the power to hold the jury composition issue had been waived and to refuse to entertain Ms. Machetti's claims on the merits, it did not do so. To the contrary, the state court heard full testimony of two witnesses and held that there was no merit to either Ms. Machetti's contention of unconstitutional jury composition or her contention that trial counsel provided ineffective assistance, by, inter alia, failing to object to the grand and traverse juries.[3/]

Petitioner did not object to Ms. Machetti's jury composition claim in either his answer or his answer to the amendments to her petition. He did not object to any testimony on the merits of the contention at the state hearing. He did not appeal the ruling on the merits by the state habeas court.

Nor did Petitioner make the necessary and requisite objections to the proposed findings of fact and conclusions of law

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[3/] See pages 2 - 3, supra.

below.[4/] When the district court adopted the magistrate's proposed findings and conclusions including the waiver issue, Machetti v. Linahan, 517 F.Supp. 1976 (M.D. Ga. 1981), Petitioner did not cross-appeal to the Eleventh Circuit.

The Eleventh Circuit correctly applied the law in this case:

> Generally, a federal court will honor a valid state procedural rule that a defendant's failure to object to a grand or petit jury before or during the trial constitutes waiver of that objection as a basis for habeas corpus relief. Francis v. Henderson, 425 U.S. 536, 541-43, 96 S.Ct. 1708, 1711, 48 L.Ed.2d 149 (1976); Stewart v. Ricketts, 451 F.Supp. 911, 913-14 (M.D. Ga. 1978). A Georgia decisional rule in force at the time of appellant's trial in February and March, 1975, mandated that result. Where, however, the state habeas court entertains the federal constitutional claims on the merits, as in the instant case, the federal habeas court must also adjudicate the merits. Lefkowitz v. Newsome, 420 U.S. 283, 292 n.9, 95 S.Ct. 886, 891 n.9, 43 L.Ed.2d 196 (1975); Newman v. Henderson, 539 F.2d 502, 505 (5th Cir. 1976)

Machetti v. Linahan, 679 F.2d 236, 238 n.4 (11th Cir. 1982).

It is therefore clear that the crucial difference between this case and Engle v. Isaac, ___ U.S. ___, 71 L.Ed.2d 783 (1982) and United States v. Frady, ___ U.S. ___, 71 L.Ed. 2d 816 (1982), is that there is no procedural default in this case because the state habeas court fully considered and adjudicated Ms. Machetti's jury composition claims on the merits. There was no need for any federal court to make a threshold inquiry into cause or prejudice; the state habeas court had already made the ultimate inquiry into the merits of the claim.

The deference to state court determinations and the principle of comity on which the recent decisions of this Court regarding waiver and 28 U.S.C. §2243 cases rest present no problem in the instant case: the Court of Appeals for the Eleventh Circuit was merely correcting an error of law made by both the state and federal habeas courts in the application of Duren v. Missouri, supra, to the facts of this case as developed in the

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[4/] See page 5, supra.

state habeas proceedings. Any other interpretation would limit the power of this Court to interpret the Constitution of the United States.

CONCLUSION

Because the United States Court of Appeals for the Eleventh Circuit correctly applied the law in this case in which Respondent's claim of unconstitutional jury composition had been fully adjudicated in the state habeas court, the petition for writ of certiorari should be denied.

Respectfully submitted,

MARY ANN B. OAKLEY
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COUNSEL OF RECORD

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40 Washington Square
New York, New York 10012

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I, MARY ANN B. OAKLEY, Attorney of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have served three copies of the foregoing Response in Opposition to Petition for Writ of Certiorari upon the Petitioner by depositing same in the United States mail with sufficient, first class postage affixed thereto, and addressed to counsel for Petitioner as follows:

Ms. Susan V. Boleyn, Assistant Attorney General
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334

This 8th day of December, 1982.

Mary Ann B. Oakley
MARY ANN B. OAKLEY

82-965

Office - Supreme Court, U.S.
FILED
DEC 9 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

NO. 82-

L. Q. LINAHAN, Warden,

Petitioner,

v.

REBECCA A. MACHETTI,
a/k/a REBECCA A. SMITH,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, Rebecca A. Machetti, a/k/a Rebecca A. Smith, by her undersigned counsel, asks leave to file the attached Response to Petition for Writ of Certiorari and to proceed in forma pauperis pursuant to Rule 46. An affidavit by Respondent in support of this motion is attached hereto. Respondent has proceeded in forma pauperis throughout these proceedings in the District Court and Court of Appeals.

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New York, New York 10012

ATTORNEYS FOR RESPONDENT

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

NO. 82-

L. Q. LINAHAN, Warden,

Petitioner,

v.

REBECCA A. MACHETTI,
a/k/a REBECCA A. SMITH,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO RESPOND TO PETITION FOR WRIT OF CERTIORARI IN FORMA PAUPERIS

I, REBECCA A. MACHETTI, being first duly sworn, depose and say that I am the Respondent in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of prosecuting the appeal are true.

1. Are your presently employed?

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. NO

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. 1974 - 400-500 per month

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? NO

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months. [illegible] building [illegible]

3. Do you own any cash or checking or savings account?

a. If the answer is yes, state the total value of the items owned. NO

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? NO

a. If the answer is yes, describe the property and state its approximate value. _____

5. List the persons who are dependent upon you for support and state your relationship to those persons. NONE

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Rebecca Machetti
REBECCA A. MACHETTI, Respondent

Sworn to and subscribed
before me this 17th day
of November, 1982.

Judy P Frey
Notary Public

My commission expires: 1-15-86

CERTIFICATE OF SERVICE

I, MARY ANN B. OAKLEY, Attorney of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have served three copies of the foregoing Motion for Leave to Proceed In Forma Pauperis and Affidavit in Support of Motion to Respond to Petition for Writ of Certiorari In Forma Pauperis upon Petitioner by depositing same in the United States mail with sufficient, first class postage affixed thereto, and addressed to counsel for Petitioner as follows:

Ms. Susan V. Boleyn
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334

This 8th day of December, 1982.

Mary Ann B Oakley
MARY ANN B. OAKLEY

82-965

NO. _____

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FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

L. Q. LINAHAN, WARDEN,

Petitioner,

vs.

REBECCA A. MACHETTI
a/k/a REBECCA A. SMITH,

Respondent.

ON APPEAL FORM THE UNITED STATES COURT

OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX TO

RESPONSE IN OPPOSITION TO PETITION FOR

WRIT OF CERTIORARI

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IN THE SUPERIOR COURT

FOR THE COUNTY OF BALDWIN

STATE OF GEORGIA

REBECCA A. SMITH, a/k/a REBECCA A. MACHETTI,	]	
Petitioner	]	
vs.	]	NO. 13598
HAROLD L. HURLEY, ACTING WARDEN, GEORGIA WOMEN'S CORRECTIONAL INSTITUTION,	]	
Respondent	]	

PETITION FOR WRIT OF HABEAS CORPUS

AND FOR A STAY OF EXECUTION

This is a petition for a writ of habeas corpus and for a stay of execution to relieve the Petitioner of restraint under a conviction and sentences of death imposed upon her by the State of Georgia in violation of her rights under the Constitution of the United States and of the State of Georgia.

1. Petitioner Rebecca A. Smith, a/k/a Rebecca A. Machetti, is presently imprisoned under sentence of death at the Georgia Women's Correctional Institution in Hardwick, Baldwin County, Georgia.

2. Respondent Harold L. Hurley is the Acting Warden of the Georgia Women's Correctional Institution in Baldwin County, Georgia. He has custody of the Petitioner in that capacity. Respondent is charged with carrying out the execution of the Petitioner's death sentence, and

is presently confining Petitioner for that purpose.

3. On March 1, 1975, Petitioner was sentenced to death in the Superior Court of Bibb County, Georgia, following her conviction for the murders of Joseph Ronald Akins and Juanita Knight Akins.

4. On January 6, 1976, the Supreme Court of Georgia affirmed Petitioner's convictions and sentences, and on January 27, 1976, that Court denied a timely motion for rehearing. Smith v. State, 236 Ga. 12, 222 S.E.2d 308(1976).

5. On September 11, 1976, Petitioner filed a petition for a writ of certiorari in the Supreme Court of the United States (Docket No. 76-5373). On November 1, 1976, that Court denied the petition for certiorari Smith v. Georgia, _____ U.S. _____, 45 U.S.L.W. 3331 (U.S., November 1, 1976), and on January 10, 1977, that Court denied a timely petition for rehearing, 45 U.S.L.W. 3465 (U.S., January 10, 1977), which Petitioner had filed on November 22, 1976.

6. On January 13, 1977, Petitioner petitioned the Superior Court of Bibb County for a declaratory judgment and/or presentence hearing and a stay of execution. Said petition was denied. On January 18, 1977, the Supreme Court of Georgia stayed Petitioner's execution pending appeal. Said Court denied Petitioner's appeal on April 7, 1977, and on April 21, 1977, denied a timely motion for rehearing. Smith v. State, 238 Ga. 655 (1977).

7. On July 15, 1977, Petitioner filed a petition

for writ of certiorari in the Supreme Court of the United States. (Docket No. 77-5099). On October 3, 1977, that Court denied the petition for writ of certiorari, Smith v. Georgia, _____ U.S. _____, 46 U.S.L.W. 3220 (October 3, 1977). On November 14, 1977, the Supreme Court further denied Petitioner's timely petition for rehearing, Smith v. Georgia, ____ U.S. _____, 46 U.S.L.W. 3323 (U.S., November 14, 1977).

8. On December 2, 1977, the Supreme Court of Georgia issued remittitur in this case to the Superior Court of Bibb County, which was received and filed in that Court on January 4, 1978. The date set for the execution of Petitioner's death sentences is January 20, 1978.

9. The restraint of the Petitioner is illegal, invalid and void for the following reasons:

A. Petitioner was convicted at a trial in which she was deprived of the effective assistance of competant counsel, uncorrected by any state official, and ability to prepare her defense in violation of her rights under the Sixth and Fourteenth Amendments to the Constitution of the United States, and Art. I, Sec. I, ¶ XI of the Constitution of the State of Georgia.

FACTS

(1) Petitioner's counsel at trial refused to

request a change of venue, even though Petitioner's husband had been convicted in the same court only 24 days before her trial and even though there was much adverse publicity in the community, which jeopardized her chance for a fair trial.

(2) Petitioner's counsel at trial failed to subpoena, despite Petitioner's urging, a witness who could have and was to have tertified in direct contradiction to much of the testimony of the chief prosecution witness and who could have cleared Petitioner of involvement in the crimes; and disappeared only three days before Petitioner's trial.

(3) Petitioner's counsel failed to move for a continuance until said witness could be relocated, even though Petitioner begged him to do so.

(4) Petitioner's counsel failed to object to the fact that Petitioner was frequently not allowed to telephone him long distance at his request, that her telephone calls to him were monitored, and that she was repeatedly refused the right to have him present when she was interrogated before trial.

(5) Petitioner's counsel at trial failed to object to the fact that Chief Deputy Ray Wilkes, who owned the apartment in which the murder victims lived, and who testified against Petitioner at trial, sent her to Warner Robins jail to spend 28 days in isolation as "punishment" for her not answering Wilkes' questions the way Wilkes wanted them answered and threatened her that she would never see her daughters again unless she

"cooperated" with him.

(6) Petitioner's counsel at trial conducted an inadequate voir dire examination.

(7) Petitioner's counsel at trial failed to use information supplied to him by Petitioner which would have impeached the testimony of the chief prosecution witness.

(8) Petitioner's counsel at trial failed to call to testify other witnesses who were present or to subpoena others whom Petitioner urged him to secure who could have either impeached the testimony of the chief prosecution witness or other witnesses for the prosecution or supported Petitioner's testimony.

(9) Petitioner's counsel at trial failed to make proper objections or to request that arguments on motions, objections, and other similar matters be conducted outside the presence of the jury.

(10) Petitioner's counsel at trial failed to introduce documents and confused dates so that he was prevented from making use of the documents during his final argument, and on direct and cross-examination of witnesses.

(11) Petitioner's counsel at trial failed to investigate and secure other evidence which would have supported Petitioner's testimony and which Petitioner urged him to obtain.

(12) Petitioner's counsel at trial failed to present evidence as to Petitioner's good character,

lack of any criminal record, or other mitigating factors. In fact, said counsel presented no evidence at the sentencing phase of the trial.

(13) Petitioner's counsel at trial prejudiced her case by referring to the recently preceding trial of her husband on the same charges.

(14) Petitioner's counsel at trial failed to move for a mistrial at the appropriate time.

(15) Petitioner's counsel at trial failed to question the Co-Defendant who testified against Petitioner as to any promise of sentence reduction or other "reward" in exchange for his testimony.

(16) Petitioner's counsel at trial failed to object to or move to strike those part of the prosecution's closing argument which alleged "facts" not in the record.

(17) Petitioner's counsel at trial failed to object to the prosecution's inflammatory, misleading and prejudicial closing argument.

(18) Petitioner's counsel at trial confused names, dates, and facts so as to present an image of unreliability to the jury.

(19) Petitioner's counsel at trial failed to move to suppress evidence seized in violation of Petitioner's rights under the Fourth Amendment to the United States Constitution.

(20) Petitioner's counsel at trial failed to raise the defense of insanity.

(21) Petitioner's counsel at trial made other errors which resulted in ineffective representation.

(22) Neither the prosecutor nor the trial

judge made any attempt to correct or ameliorate the aforestated incompetence of Petitioner's counsel at trial, but rather participated in and/or took advantage of much of it.

B. Petitioner's rights under the Fifth and Sixth Amendments and under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and Art. I, Sec. I ¶s I, IX, XI, and XIII of the Constitution of the State of Georgia were violated by the prosecution's use of her post-arrest silence against her.

FACTS

(1) Petitioner testified at trial as to facts she had never told investigating authorities because she had never been asked, and the prosecution used that part of her testimony to imply that the facts were a tardy fabrication to conceal her own guilt.

(2) The prosecution at trial argued that Petitioner's failure to shed tears, either before or during the trial, was evidence of her guilt.

C. Petitioner's rights under the Fifth and Sixth Amendments and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and Art. I, Sec. I, ¶¶ I, IX, XI and XIII of the Constitution of

the State of Georgia were violated because she was suffering from the effect of personality-altering drugs administered to her before and during the trial.

FACT

Petitioner was given drugs while was was incarcerated, before and during her trial, which prevented her from thinking clearly and making normal responses to questions while she testified, thereby misleading the jurors as to her true character and personality.

D. Petitioner's rights under the Due Process Clause of the Fourteenth Amendment and the Sixth Amendment to the Constitution of the United States, and Art. I, Sec. I, ¶¶ I and XI of the Constitution of the State of Georgia, were violated because of the indictment charging the Petitioner contained no notice of aggravating circumstances, thereby depriving Petitioner of an opportunity to be heard and to assist her counsel in the preparation of her defense, and to have the grand jury pass upon elements of aggravation.

FACTS

(1) The prosecution in this case alleged four aggravating circumstances to justify the imposition of

the death penalty.

(2) The Defendant was not advised in the indictment that aggravating circumstances were being charged or that proof would be offered thereon.

(3) The Defendant learned of the intent of the State to offer evidence on the question of aggravating circumstances at so late an hour prior to trial as to prohibit adequate response thereto, or to allow preparation of rebuttal thereto.

(4) The grand jury did not consider and screen every factual allegation of the prosecution which was subsequently to be used at trial as the basis for Petitioner's conviction of a grade of offense which subjected her to the death penalty.

E. Petitioner's rights under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and Article I, Sec. I, ¶1 of the Constitution of the State of Georgia were violated because the prosecutor made improper references to the death penalty in his closing argument during the sentencing phase of the trial.

FACTS

(1) The prosecutor referred to disagreement as to the propriety of capital punishment.

(2) The prosecutor specifically asked for two consecutive, rather than concurrent, death sentences

and left the clear impression that Petitioner might someday get her sentences commuted and should be imprisoned for the maximum possible time.

F. The imposition and execution of Petitioner's death sentences under Georgia law and practice violate the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and Art. I, Sec. I, ¶¶ I, XI, XIII and XIV of the Constitution of the State of Georgia.

FACTS

(1) The death sentence is cruel and unusual punishment for a person, such as Petitioner, who was not even present at the scene of the crime, but who was in another state when the murders were committed.

(2) Because the death sentences were imposed at a time when the constitutionality of capital punishment was unclear, there is every likelihood that at least some of the sentencing jury believed that Petitioner would never actually be executed.

(3) The death penalty is in fact administered and applied arbitrarily, capriciously, and whimisically in the State of Georgia; and Petitioner was sentenced to die, and will be executed, pursuant to a pattern and practice of wholly arbitrary and capricious infliction of that penalty.

(4) The theoretical justifications for capital punishment are groundless and irrational in fact; and

death is thus an excessive penalty which fails factually to serve any rational and legitimate social interests that can justify its unique harshness.

(5) Actual infliction of the death penalty in general and in cases like Petitioner's in particular has in fact been repudiated by contemporary standards of decency and dignity.

(6) The means by which the death sentences in this case are to be administered, to wit, electrocution, will inflict wanton and unnecessary torture and torment upon her.

(7) Petitioner's death is being exacted pursuant to a pattern and practice of Georgia prosecuting authorities, courts, juries and Governors to discriminate on grounds of poverty in the administration of capital punishment.

(8) The Georgia statutory provisions and practices governing appellate review of death sentences:

(a) deny Petitioner effective assistance of counsel;

(b) deny Petitioner a fundamentally fair hearing on the issue of life and death;

(c) deny Petitioner the effective assistance of counsel and the tools of an adequate defense and appeal because of her indigency.

G. Petitioner's rights under the Eighth Amendment and the Due Process Clause of the Fourteenth

Amendment to the Constitution of the United States and Art. I, Sec. I, ¶¶ I, XI, and XIV of the Constitution of the State of Georgia were violated because the trial court failed to assure a non-capricious sentencing process.

FACTS

(1) The trial jury was not instructed to avoid any influence of passion, prejudice, or any other arbitrary factor when imposing sentence.

(2) The trial jury was only vaguely instructed as to mitigating circumstances.

(3) The Georgia Code, at Sec. 27-2534.1, fails to enumerate or clearly define mitigating circumstances as do the codes of most other states with capital punishment permitted under a bifurcated process such as Georgia used.

(4) The nature and control of the voir dire examination by the prosecution implied that a guilty verdict would require imposition of the death sentence during the sentencing process.

(5) Because Petitioner was sentenced before the United States Supreme Court upheld the constitutionality of Georgia's death penalty statute, the jury could easily have believed Petitioner would never actually be executed. References in the prosecution's closing argument and the trial court's remarks and the speed with which the trial court hastened the

sentencing process supported such a belief.

(6) Because the guilty verdicts were returned late in the evening, the sentencing hearing and jury deliberation were held quite late at night, Petitioner was deprived of full consideration by a fresh, attentive jury.

H. Petitioner's rights under the Sixth and Eighth Amendments and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and Art. I, Sec. I, ¶¶ I, XI, and XIV of the Constitution of the State of Georgia were violated because the Supreme Court of Georgia failed to provide an impartial appeal or sentence review.

FACTS

(1) Petitioner's case was consolidated on appeal with that of her husband who, although he was convicted of the same murders at a separate trial, was alleged to have done and was convicted of doing the actual killing; Petitioner was admitted by the prosecution to have been in the Miami, Florida area when the murders occurred.

(2) Said consolidated appeal denied Petitioner the right to confrontation as to testimony from the transcript of her husband's trial which might have been harmful to her.

(3) The Georgia Supreme Court did not inform Petitioner in advance with which other sentences hers would be compared, in order that her counsel might present argument as to the relevancy or irrelevancy thereof.

(4) The Georgia Supreme Court did not compare Petitioner's sentences with other cases in which the death penalty was not imposed.

(5) Many of the other cases with which Petitioner's sentences were compared arose under the Georgia death penalty statute declared unconstitutional by the United States Supreme Court in 1972, and were therefore lacking facts about the "defendant" as opposed to the "crime."

(6) The universe of cases used for comparison was irrational, because only those of which records were available were used, thereby excluding those from which no appeal was taken.

(7) The statute does not require articulated findings where the sentence of death is not imposed.

I. Petitioner's rights under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and Art I., Sec. I, and ¶¶ I and XI of the Constitution of the State of Georgia were violated because the trial court refused to let her introduce evidence which would have strengthened her defense.

FACTS

(1) Evidence was excluded which could have impeached a key prosecution witness.

(2) Evidence was excluded which would have corroborated Petitioner's story about events preceding the murders.

(3) Evidence was excluded which would have shown that at least one key prosecution witness had sufficient interest in getting revenge against Petitioner to frame her.

(4) Evidence was excluded to support other theories as to who committed the murders and why.

(5) Petitioner's counsel at trial was not permitted to ascertain whether or not the members of the jury understood the concept of "reasonable doubt."

(6) Petitioner's counsel at trial was not permitted a copy of a prior confession of one witness which would have impeached his testimony at trial.

J. The time set for execution was established in violation of Georgia statutory procedure and therefore in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States as defined by such statute, in that the trial judge did not set a time and date certain, but established only the method by which the time and date of execution might be determined by those responsible for executing the sentence.

FACTS

(1) The trial judge, in fixing sentences, provided that the execution of the Defendant would take place on the 15th day following receipt in the trial court of remittitur from the Supreme Court of Georgia.

(2) Georgia statutory law provides that the trial judge will set a date certain, and when the case is appealed, and remittitur received, that the trial judge will then set a date no less than 10 nor more than 20 days following the receipt of the remittitur for the execution of the sentence. Ga. Code Ann. §§ 27-2518, 25-2519.

K. The imposition and execution of Petitioner's death sentences violate the Sixth and Fourteenth Amendments to the Constitution of the United States and Art. I, Sec. I, ¶¶ I, XI and XI of the Constitution of the State of Georgia by denying her trial by a representative way.

FACTS

(1) The sentences were imposed pursuant to the verdict of a jury selected through procedures that systematically excluded from jury service all persons having conscientious or religious scruples against

capital punishment, without sufficient individualized examination of the beliefs of each particular excluded venireman.

(2) The sentences were imposed pursuant to the verdict of a jury from which all persons having conscientious or religious scruples against capital punishment were systematically excluded, with the result that the jury did not constitute a representative cross-section of the community.

(3) All persons having conscientious or religious scruples against capital punishment were systematically excluded from the jury which determined Petitioner's guilt or innocence, thereby depriving Petitioner of a vital constitutional right, her right to a jury selected from a representative cross-section of the community, without furthering any permissible state interest.

(4) She was convicted and sentenced to die by a jury that did not reflect a representative cross-section of the community and was not impartial in fact, but was unrepresentative and biased in favor of the prosecution on the issue of Petitioner's guilt of the crimes with which she was charged.

(5) Under Section 59-112 of the Georgia Code, women who are housewives with children 14 years of age or younger may be excused from jury duty merely by request; men in a similar status do not have a comparable right.

L. The Petitioner was convicted on the basis of information obtained in violation of her privilege against self-incrimination under the Fifth and Fourteenth Amendments to the Constitution of the United States, and Art. I, Sec. I, ¶ XIII of the Constitution of the State of Georgia.

FACTS

(1) Evidence was offered against the Defendant at the trial consisting of statements made by the Defendant to law enforcement officers.

(2) The said statements of the Defendant to law enforcement officers were incriminatory as to the question of the existence of aggravating circumstances and to the question of guilt, in that statements were introducted regarding the Defendant's knowledge of the existence of certain insurance policies and statements were introduced regarding the Defendant's providing the officers with an alibi for persons accused of the actual act of killing.

(3) The said statements were made involuntarily to the officers and without the proper warnings regarding the Constitutional rights of the Defendant with respect fo self-incrimination and representation by counsel.

10. January 20, 1978 is the date set for Defendant's execution. Petitioner faces irreparable injury if her execution is not stayed by this Court.

WHEREFORE, Petitioner respectfully requests:

(a) That this Court forthwish issue an order staying her execution pending final disposition of this matter;

STATE OF GEORGIA

COUNTY OF FULTON

VERIFICATION

I, MARY ANN B. OAKLEY, after first being duly sworn upon oath according to law, depose and say:

That I am a member in good standing of the Bar of the State of Georgia;

That I am the duly authorized attorney for the Petitioner herein, authorized to prepare and verify the within and foregoing petition;

That I have read the within and foregoing petition and know the contents thereof;

That I know of my personal knowledge that all facts stated therein are true except such as are stated on information and belief;

That as to subject matter I believe the petition to be true; and

That I sign this verification on behalf of the Petitioner, because the within and foregoing petition deals chiefly with matters of law and legal inference to be drawn from facts alleged and of which I as an attorney have more knowledge than Petitioner, and for the further reason that the Petitioner, whose execution date is set for January 20, 1978, is located at the Georgia Women's Correctional Institution at Hardwick, Georgia, and there is not time to secure her personal verification.

Mary Ann B. Oakley

MARY ANN B. OAKLEY

Sworn to and subscribed before me, this the 5 day of January, 1979.

Michael T. Thomas

Notary Public

Commission expires: 7/13/81

IN THE SUPERIOR COURT OF BALDWIN COUNTY

STATE OF GEORGIA

REBECCA A. SMITH, a/k/a REBECCA A. MACHETTI, Petitioner,	*	
v.	*	CIVIL ACTION NO. 13548
HAROLD L. HURLEY, Acting Warden, Georgia Women's Correctional Institution, Respondent.	*	HABEAS CORPUS

RETURN AND ANSWER

Comes now Harold L. Hurley, Acting Warden, Georgia Women's Correctional Institution, Respondent in the above-styled action, and for his return and answer to the petition shows and states the following:

1.

Respondent admits that portion of the petition entitled A.(1) in which the Petitioner alleges that her trial counsel did not request a change of venue, but denies that this resulted in ineffective assistance of counsel being rendered to the Petitioner.

2.

Respondent is without sufficient knowledge or information to admit or deny the allegations of the Petitioner as contained in A.(2)in which the Petitioner alleges that Petitioner's trial counsel failed to subpoena a witness who could have allegedly contradicted certain testimony of the chief prosecution witness.

3.

Respondent is without sufficient knowledge or information to admit or deny the allegations of the petition as contained in A.(3) in which the Petitioner alleges that her trial counsel did not move for a continuance to locate a witness as requested by the Petitioner.

4.

Respondent is without sufficient knowledge or information to admit or deny the allegations of the petition as contained in paragraph A.(4) in which Petitioner alleges that her trial counsel failed to object to her not being allowed to telephone him at his request and to object that her telephone calls were monitored, and she was refused the right to have him present during pre-trial interrogation.

5.

Respondent is without sufficient knowledge or information to admit or deny the allegations of the Petitioner as contained in paragraph A.(5) in which Petitioner alleges that Chief Deputy Ray Wilkes sent her to Warner Robins jail for 28 days as punishment for not answering Mr. Wilkes' questions.

6.

Respondent denies that portion of the petition as contained in paragraph A.(6) in which the Petitioner alleges that her trial counsel conducted inadequate voir dire examination. Respondent is without sufficient knowledge or information to admit or deny the allegations of Petitioner as contained in paragraph A.(7) in which the Petitioner alleges that her trial counsel failed to

use impeachment type information supplied to him by the Petitioner.

7.

Respondent is without sufficient knowledge or information to admit or deny the allegations of Petitioner as contained in paragraph A.(8) in which the Petitioner alleges that her trial counsel failed to call or subpoena other witnesses whom Petitioner urged him to secure.

8.

Respondent denies that portion of the petition entitled A.(9) in which the Petitioner alleges that her trial counsel failed to make proper motions and objections during the trial.

9.

Respondent denies the allegations of the Petitioner as contained in paragraph A.(10) in which Petitioner alleges that he failed to introduce documents and confused dates so as to prevent him from using the documents during his final argument.

10.

Respondent denies that portion of the petition entitled A.(11) in which the Petitioner alleges that her trial counsel failed to investigate and secure other supporting evidence which he was urged by Petitioner to obtain.

11.

Respondent admits that portion of the petition entitled A.(12) in which the Petitioner alleges that her trial counsel failed to introduce any evidence at the sentencing phase of the trial, but denies that this deprived the Petitioner of the effective assistance of competent counsel.

12.

Respondent denies that there was any prejudice to the Petitioner as alleged in paragraph A.(13) in which the Petitioner alleges that prejudice occurred by her trial counsel's reference to the preceding trial of her husband.

13.

Respondent denies that portion of the petition entitled paragraph A.(14) in which Petitioner alleges that her trial counsel failed to move for a mistrial at the appropriate time.

14.

Respondent denies that portion of the petition entitled paragraph A.(15) as being prejudicial of the Petitioner's right to receive the effective assistance of counsel.

15.

Respondent is without sufficient knowledge or information to admit or deny the allegations of the petition as contained in paragraph A.(16) in which Petitioner alleges that her trial counsel failed to object to those portions of the prosecution's closing argument alleging facts not contained in the record.

16.

Respondent is without sufficient knowledge or information to admit or deny the allegations of the Petitioner as contained in paragraph A.(17) in which the Petitioner alleges that her trial counsel failed to object to portions of the prosecution's closing argument as being inflammatory, misleading and prejudicial as Respondent cannot determine to which portions of the closing argument Petitioner is referring.

17.

Respondent denies that portion of the petition entitled paragraph A.(18) in which Petitioner states that her trial counsel presented an image of unreliability to the jury.

18.

Respondent is without sufficient knowledge or information to admit or deny the allegations of Petitioner as contained in paragraph A.(19) in which the Petitioner alleges that her trial counsel failed to make a motion to suppress evidence, as Petitioner does not specify which evidence is allegedly seized in violation of Petitioner's Fourth Amendment rights.

19.

Respondent admits that portion of the petition as contained in paragraph A.(20) in which the Petitioner alleges that her trial counsel failed to raise the defense of insanity, but denies that this resulted in Petitioner receiving the ineffective assistance of competent counsel.

20.

Respondent denies that portion of the petition entitled A.(22) in which the Petitioner alleges that the prosecutor and the trial judge did not make any attempt to correct the incompetence of Petitioner's counsel, but participated and/or took advantage of it.

21.

Respondent denies that portion of the petition entitled paragraph B. in which Petitioner alleges that her due process rights under the United States and Georgia Constitutions were violated by the prosecution's use of her post-arrest silence against her.

22.

Respondent denies that portion of the petition entitled C. in which Petitioner alleges that her constitutional rights were violated because she was suffering from the effect of personality-altering drugs administered to her before and during the trial.

23.

Respondent denies that portion of the petition entitled paragraph D. in which the Petitioner alleges that her due process rights were violated because the indictment charging the Petitioner did not contain notice of aggravating circumstances.

24.

Respondent denies that portion of the petition entitled paragraph E. in which the Petitioner alleges that her due process rights were violated because the prosecutor made improper references to the death penalty in his closing argument during the sentencing phase of the trial.

25.

Respondent denies that portion of the petition entitled paragraph F. in which the Petitioner alleges that the imposition and execution of death sentences under Georgia law and practice violate the Sixth, Eighth and Fourteenth Amendments of the Constitution of the United States and also sections of the Constitution of the State of Georgia.

26.

Respondent denies that portion of the petition entitled paragraph G. in which the Petitioner alleges that her rights under the Eighth Amendment and the due process clause of the Fourteenth Amendment were violated because the trial court failed to assure a non-capricious sentencing process.

27.

Respondent denies that portion of the petition entitled paragraph H. in which the Petitioner alleges that her constitutional rights were violated because the Supreme Court of Georgia failed to provide an impartial appeal or sentence review.

28.

Respondent is without sufficient knowledge or information to admit or deny the allegations of the Petitioner as contained in paragraph I. in which the Petitioner alleges that her rights were violated because the trial court refused to let her introduce evidence which would have strengthened her defense.

29.

Respondent denies that portion of the petition entitled paragraph J. in which Petitioner alleges that the time set for execution was established in violation of Georgia statutory procedure and therefore violated the due process clause of the Fourteenth Amendment to the United States Constitution.

30.

Respondent denies that portion of the petition entitled paragraph K. in which Petitioner alleges that the imposition and execution of Petitioner's death sentences violate the Sixth and Fourteenth Amendments by denying her a trial by a representative way.

31.

Respondent denies that portion of the petition entitled paragraph L. in which the Petitioner states that she was convicted on the basis of information obtained in violation of her privilege against self-incrimination.

32.

Respondent denies each and every allegation of fact and law contained in the petition not herein admitted, controverted or specifically denied.

Respectfully submitted,

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

RICHARD L. CHAMBERS
First Assistant
Attorney General

JOHN C. WALDEN
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Assistant Attorney General

Please serve:

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132 State Judicial Bldg.
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Atlanta, Georgia 30334
(404) 656-6344

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with a copy of this pleading by depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage thereon.

THIS 1st day of Feb. 19 78

Counsel for Respondent

PERSON(s) SERVED

Ms. Mary Ann B. Oakley
794 Juniper Street, N.E.
Atlanta, Georgia 30308

IN THE SUPERIOR COURT OF BALDWIN COUNTY

STATE OF GEORGIA

REBECCA A. SMITH, a/k/a/ REBECCA A. MACHETTI, Petitioner,	*	
v.	*	CIVIL ACTION NO. 13548
HAROLD L. HURLEY, Acting Warden, Georgia Women's Correctional Institution, Respondent.	*	HABEAS CORPUS

AMENDMENT TO PETITION FOR WRIT OF HABEAS CORPUS

Comes now Petitioner Rebecca A. Smith a/k/a Rebecca A. Machetti and, under the Georgia Civil Practice Act, Ga. Code. § 81A-115, amends her Petition as follows:

1. By adding to Paragraph 9A the following subparagraphs 23-26:

"(23) Petitioner's counsel at trial failed to file a Brady motion or other motion for discovery."

"(24) Petitioner's counsel at trial failed to obtain any psychiatric or psychological evaluations of Petitioner."

"(25) Petitioner's counsel at trial failed to investigate or object to the sex or race composition of the grand or traverse jury pool."

"(26) Petitioner's counsel at trial failed to request a preliminary hearing."

2. By deleting the word "effective" in line 2 of sub-paragraph (21) under Paragraph 9A and replacing it with the word "ineffective," so as to correct a typographical error.'

3. By adding to the "FACT" under Paragraph 9C the following sentence:

"Petitioner was also prevented from assisting adequately in the preparation of her defense."

4. By adding to Paragraph 9E the following subparagraph (3):

"(3) The prosecutor read an excerpt from Eberhart v. State to the jury and attributed it specifically to the Georgia Supreme Court."

5. By deleting the word "way" in the last line of Paragraph 9K and replacing it with the word "jury," so as to correct a typographical error.

6. By adding to Paragraph 9K the following subparagraph (6):

"(6) Petitioner was indicted, convicted and ~~sentenced~~sentenced to die by juries in which women and blacks were greatly underrepresented."

Respectfully submitted,

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Stanford, California 93405

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with a copy of this pleading by depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage thereon.
This 16 day of [illegible], 1978

Attorney for [illegible]

IN THE SUPERIOR COURT OF BALDWIN COUNTY
STATE OF GEORGIA

REBECCA A. SMITH, a/k/a, REBECCA A. MACHETTI,	*	CIVIL ACTION NO. 3548
Petitioner,	*	
v.	*	HABEAS CORPUS
HAROLD L. HURLEY, ACTING WARDEN, GEORGIA WOMEN'S CORRECTIONAL INSTITUION,	*	
Respondent.	*	

SUPPLEMENTAL RETURN AND ANSWER

COMES NOW Respondent, Harold L. Hurley, Warden, and makes this supplemental Return and Answer in response to Petitioner's amendment to her petition for a writ of habeas corpus under the Georgia Civil Practice Act, Ga. Code Ann. § 81A-115:

1.

Respondent admits that portion of the petition entitled A.(23) of the amendment to the petition in which the Petitioner states that her trial counsel failed to file a Brady motion or other motion for discovery, but denies that this resulted in Petitioner receiving the ineffective assistance of counsel at trial.

2.

Respondent admits that portion of the amendment to the petition entitled A.(24) in which the Petitioner states that her trial counsel failed to obtain psychiatric or psychological evaluations of Petitioner, but denies that this resulted in ineffective assistance of counsel being rendered to the Petitioner.

3.

Respondent is without sufficient knowledge or information to admit or deny the allegations of the Petitioner in that portion of the amendment to the petition entitled A.(25) in which the Petitioner states that her trial counsel failed to investigate the sex or race composition of the grand or traverse jury pools.

4.

Respondent admits that portion of the amendment to the petition entitled A.(25) in which the Petitioner states that her trial counsel failed to object to the sex or race composition of the grand or traverse jury pool, but denies that this resulted in the Petitioner receiving the ineffective assistance of counsel at trial.

5.

Respondent admits that portion of the amendment to the petition entitled A.(26), in which the Petitioner alleges that her trial counsel failed to request a preliminary hearing, but denies that this resulted in Petitioner receiving the ineffective assistance of counsel.

6.

Respondent denies that portion of the amendment to the petition added as a "fact" under paragraph 9(c) in which the Petitioner states that she was prevented from assisting adequately in the preparation of her defense.

7.

Respondent denies that portion of the amendment to the petition as an addition to paragraphs 9(e), as subparagraph (3) in which the Petitioner alleges that the prosecutor's closing argument was improper due to his reading of an excerpt from Eberhart v. State to the jury and attributing it specifically to the Georgia Supreme Court.

Respondent denies that portion of the amendment to the petition as subparagraph (6) to paragraph 9(k) in which the Petitioner states that she was indicted, convicted and sentenced to die by juries in which women and black were greatly under-represented.

9.

Respondent denies each and every allegation of fact and law contained in the amendment to the petition for a writ of habeas corpus not herein admitted, controverted or specifically denied.

Please serve:

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(404) 656-6344

Respectfully submitted,

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ROBERT S. STUBBS, II
Executive Assistant Attorney General

Richard L. Chambers

RICHARD L. CHAMBERS
First Assistant Attorney General

John C. Walden

JOHN C. WALDEN
Senior Assistant Attorney General

Susan V. Boleyn

SUSAN V. BOLEYN
Assistant Attorney General

Day of February 78
Susan V. Boleyn
Counsel for Respondent
PERSON(s) SERVED

Ms. Mary Ann B. Oakley
Attorney at Law
794 Juniper Street, N.E.
Atlanta, GA 30308

Hopefully they are accurate but, of course, naturally I wouldn't swear to that. I do think they are in the ball park.

Q What is the percentage of female population of Bibb County?

A Over 50 percent.

Q Do you hve figures on the 1971 jury box or the jury box prior to the one we just discussed?

A I have apparently the result of a little survey that was very similar in nature to the one done in '73.

Q Could you tell me the percentage of blacks in the traverse jury pool?

A Well, I will give you the figures. Like I say, I would not testify that this was the final figure, because if my memory serves me correctly, probably some work was done following the survery again to improve the ratio and I do not have the results of that survey if one was made. I know some work was done, but I am not sure about the survey.

Q All right.

MS. BOLEYN: Your Honor, what is the relevance of the testimony as to the box before 1973?

THE COURT: Ms. Oakley?

MS. OAKLEY: We are trying to show exclusion, and I think we need to go back more than to the box we are talking about.

THE COURT: If that is what she is trying to prove. Is that alleged as one of the grounds in the petition?

MS. OAKLEY: It is alleged both as a separate ground and it is alleged as failure of counsel to challenge.

THE COURT: All right, you may proceed. I overrule the objection.

Q Ms. Oakley: Mr. Greene, you said you had numbers, how many persons were in the 1971 pool of jurors?

A The '71 box? Okay, the box - it actually was put into effect January 25, 1972. Of course, all the work regarding the revision was done in the latter part of 1971 and the traverse jury box contained 10,737 names.

Q The grand jury box?

A 1,814.

Q All right, what percentage of the 10,737 persons were black as best your records reflect?

A To the best of my knowledge from the survey that was made at that time, the total figure does not tally exactly with the ones that ultimately were put in the box. There were 2 or 3 different reasons why that varied. Of course, it is close. At the time the survey was made, they show 10,335 total, and of that total 1,293 were black. You will have to figure that out. I have not figured that out percentage wise.

Q That's fine.

THE COURT: How many was black?

The Witness: 1,293.

THE COURT: Out of 10,335?

The Witness: Right.

Q Ms. Oakley: How many of the 10,335 were

IN THE SUPERIOR COURT FOR THE COUNTY OF BALDWIN,

STATE OF GEORGIA.

REBECCA A. SMITH a/k/a REBECCA A. MACHETTI,	: Civil Action File No. 13548.
	: Habeas Corpus.
Petitioner.	:
v.	:
HAROLD L. HURLEY, Acting Warden, Georgia Women's Correctional Institution,	:
	:
Respondent.	

ORDER

The above styled case came on for hearing on February 1, 1978, and March 1, 1978, in the Superior Court of Baldwin County, Georgia. Upon consideration of the petition and evidence presented, it appears as follows:

FINDINGS OF FACT

The Petitioner, Rebecca A. Smith, a/k/a Rebecca A. Machetti, is presently incarcerated in Georgia Women's Correctional Institution in Milledgeville, Georgia. On March 1, 1975, the Petitioner was sentenced to death following her conviction for the murders of Joseph Arnold Akins and Juanita Knight Akins, in the Superior Court of Bibb County, Georgia, by Judge C. Cloud Morgan.

The Petitioner appealed her conviction to the Supreme Court of Georgia. On January 6, 1976, the Supreme Court of Georgia affirmed the convictions of the Petitioner in Smith v. The State, 236 Ga. 12 (222 S.E. 2d 308) (1976).

The Petitioner filed for a writ of certiorari in the United States Supreme Court on September 11, 1976. On November 1, 1976, the United States Supreme Court denied the Petitioner's petition for writ of certiorari in Smith v. Georgia, ____U.S. ____, 97 S.Ct. 339. On January 10, 1977, the United States Supreme Court in Smith v. Georgia, ____U.S. ____, 97 S.Ct. 771, denied Petitioner's petition for re-hearing.

On January 13, 1977, the Petitioner petitioned the Superior Court of Bibb County, Georgia, for a declaratory

judgment and/or a pre-sentence hearing and a stay of execution. The Superior Court of Bibb County, Georgia, denied the petition. The Petitioner then appealed this decision to the Supreme Court of Georgia, which stayed the Petitioner's execution pending appeal. The Supreme Court of Georgia denied the Petitioner's appeal on April 7, 1977, and denied the motion for re-hearing in Smith v. The State, 238 Ga. 655 (235 S.E. 2d 375[1]).

On July 15, 1977, the Petitioner filed a petition for writ of certiorari in the Supreme Court of the United States. On October 3rd, 1977, the United States Supreme Court denied the petition for writ of certiorari in the case of Smith v. Georgia, _____ U.S. _____, 98 S. Ct. 232. On November 14, 1977, the United States Supreme Court further denied Petitioner's petition for re-hearing in the case of Smith v. Georgia, _____U.S. _____ 98, S. Ct. 496.

On January 9, 1978, the Petitioner filed in this Court a petition for writ of habeas corpus. The Respondent, Harold L. Hurley, Acting Warden, Georgia Women's Correctional Institution, was duly served on January 11, 1978. The Respondent filed his answer in this Court on February 1, 1978.

Remittitur in Petitioner's case was issued to the Superior Court of Bibb County on December 2, 1977, and filed on January 4, 1978. Petitioner's execution was set for January 20, 1978.

On January 9, 1978, this Court issued an order staying the execution of the Petitioner, Rebecca A. Smith a/k/a Rebecca A. Machetti, which stated: "On application for a stay of execution of the sentence of death imposed upon the Petitioner by the Superior Court of Bibb County, Georgia, and scheduled to be carried out at the Georgia State Prison on January 20, 1978, it is hereby ordered, that the application for a stay is hereby granted, and the Petitioner's execution scheduled for January 20, 1978,

is hereby stayed until further order of this Court. It is further ordered that the Clerk shall give immediate notice by telephone and by telegraph to the Respondent Warden, and to the Attorney General of the State of Georgia, that the Petitioner's execution is stayed by the order of this Court."

On February 1, 1978, a hearing was held in this Court concerning the Petitioner's motions for appointment of experts authorized for investigation, and continuance, and motion for costs and expenses to pursue habeas corpus relief. On February 8th, 1978, nunc pro tunc as of February 1, 1978, this Court denied the Petitioner's motion for appointment of experts authorized for investigation, and motion for costs and expenses necessary to pursue habeas corpus relief. However, this Court did grant on February 8, 1978, nunc pro tunc as of February 1, 1978, Petitioner's motion for a continuance, and it was ordered that the petition for writ of habeas corpus be heard on March 2nd, 1978, in this Court.

After the hearing on March 2, 1978, the matter was taken under advisement. Counsel of Record for Petitioner and Respondent requested time to submit argument by briefs after the transcript of the hearing had been completed, which was accomplished and filed on April 3, 1978, in the Office of the Clerk of the Superior Court of Baldwin County, Georgia. A Post-Hearing Brief on behalf of Petitioner was filed on or about May 31, 1978. Thereafter An Additional or Supplemental Post-Hearing Brief on behalf of Petitioner on recent decisions of Lockett and Bell was filed on July 10, 1978, and no Response Brief on behalf of Respondent was filed thereto.

As stated, the Court agreed to take the case under advisement and has since been delayed in completing and filing this order due to heavy caseload and trial docket of the Courts in this multi-county Circuit, and also due

to the requirement that the order consist of Findings of Fact and Conclusions of Law, and the detail of the pleadings and volume of the transcript.

No further Finding of Facts shall be made except as may be found necessary in the Conclusions of Law to be hereinafter set forth.

CONCLUSIONS OF LAW

The Petitioner, Rebecca A. Smith, a/k/a Rebecca A. Machetti, moves for writ of habeas corpus, contending her constitutional rights have been violated. More specifically, she contends: (1) That she was convicted at a trial in which she was deprived of the effective assistance of competent counsel, uncorrected by any state official, and ability to prepare her defense in violation of her rights under the Sixth and Fourteenth Amendments to the Constitution of the United States, and Art. I, Sec. I, Paragraph XI of the Constitution of the State of Georgia; (2) That her rights under the Fifth and Sixth Amendments and under Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and Art. I, Sec. I, Paragraphs IX, XI, and XIII of the Constitution of the State of Georgia were violated by the prosecution's use of her post-arrest silence against her; (3) That her rights under the Fifth and Sixth Amendments and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and Art. I, Sec. I, Paragraphs I, IX, XI, and XIII of the Constitution of the State of Georgia were violated because she was suffering from the effect of personality-altering drugs administered to her before and during the trial; (4) That her rights under the Due Process Clause of the Fourteenth Amendment and the Sixth Amendment to the Constitution of the United States, and Art. I, Sec. I, Paragraphs I and XI of the Constitution of the State of Georgia, were violated because of the indictment charging the Petitioner contained no notice of aggravating circumstances, thereby depriving Petitioner of an opportunity to

be heard and to assist her counsel in the preparation of her defense, and to have the grand jury pass upon elements of aggravation; (5) That her rights under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and Art. I, Sec. I, Paragraph I of the Constitution of the State of Georgia were violated because the prosecutor made improper references to the death penalty in his closing argument during the sentencing phase of the trial; (6) That the imposition and execution of Petitioner's death sentences under Georgia law and practice violate the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States, and Art. I, Sec. I, Paragraphs I, XI, XIII, and XIV of the Constitution of the State of Georgia; (7) That her rights under the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, and Art. I, Sec. I, Paragraphs I, XI, and XIV of the Constitution of the State of Georgia were violated because the trial court failed to assure a non-capricious sentencing process; (8) That her rights under the Sixth and Eighth Amendments and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and Art. I, Sec. I, Paragraphs I, XI, and XIV of the Constitution of the State of Georgia were violated because the Supreme Court of Georgia failed to provide an impartial appeal or sentence review; (9) That her rights under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, and Art. I, Sec. I, and Paragraphs I and XI of the Constitution of the State of Georgia were violated because the trial court refused to let her introduce evidence which would have strengthened her defense; (10) That the time set for execution was established in violation of Georgia statutory procedure and therefore in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States as defined by such statute, in that the trial judge did not set a time and date certain, but

established only the method by which the time and date of execution might be determined by those responsible for executing the sentence; (11) That the imposition and execution of Petitioner's death sentences violate the Sixth and Fourteenth Amendments to the Constitution of the United States, and Art. I, Sec. I, Paragraphs I, XI, and XI of the Constitution of the State of Georgia by denying her trial by a representative way; (12) The Petitioner was convicted on the basis of information obtained in violation of her privilege against self-incrimination under the Fifth and Fourteenth Amendments to the Constitution of the United States, and Art. I, Sec. I, Paragraph XIII of the Constitution of the State of Georgia.

This Court holds as submitted by Respondent that the issues to be determined in a State habeas corpus proceeding where the Petitioner is being held under a sentence of death, are the same issues as those in any other State habeas corpus proceeding, namely, whether there was a substantial denial of the Petitioner's rights in the proceedings resulting in her conviction under the Constitution of the United States or under the Constitution or laws of the State of Georgia. Ga. Code Ann. Section 50-127 (1). Petitioner is bound by the same standard, as Georgia law does not differentiate between death penalty and non-death penalty cases for purposes of habeas corpus.

This Court also holds that even those issues which Petitioner presented to the Georgia Supreme Court in her direct appeal from her conviction, are not reviewable by this Court. It has been repeatedly held that once an individual has been given appellate review on issues raised in an appeal, these same issues may not be raised again by means of a habeas corpus proceeding. Treadwell v. Hopper, 235 Ga. 241, 242 (219 S.E. 2d 155) (1975); Brown v. Ricketts, 233 Ga. 809 (213 S.E. 2d 672) (1975); Elrod v. Ault, 231 Ga. 750 (204 S.E. 2d 148) (1974);

Herring v. Ault, 230 Ga. 398 (197 S.E. 2d 354) (1973); Krist v. Caldwell, 230 Ga. 536 (1) (198 S.E. 2d 161) (1973); Brooks v. Ault, 228 Ga. 863 (188 S.E. 2d 799[2]) (1972). To hold otherwise would continue to broaden unnecessarily the process of habeas corpus proceedings and make the caseloads of both State and Federal Courts even heavier and more difficult to keep even reasonably current within a reasonably minimum time.

This Court holds that it is precluded from considering those issues previously raised and considered on appeal, even in light of Petitioner's reasoning that an exception should be made in this case.

As agreed by all counsel of record, this Court also holds that issues presented to the United States Supreme Court in a petition for certiorari, which is subsequently denied, are issues which may be properly considered by this Court. This is provided, however, that these issues are within the purview of a habeas corpus proceeding and, as discussed previously, have not been raised and considered on direct appeal. This Court holds that to provide a basis for the issuance of a writ of habeas corpus, the burden is on the habeas corpus petitioner to establish the factual basis of a contention. Sims v. Smith, 228 Ga. 136, 137 (184 S.E. 2d 347[2]) (1971); Wilson v. Hopper, 234 Ga. 859, 863 (218 S.E. 2d 573) (1975).

"'The burden is on the applicant to make out his case, that is, to prove to the satisfaction of the habeas corpus judge that the alleged violation of his constitutional rights did, in fact, occur.' Sims v. Smith, 228 Ga. 136, 137 (184 S.E. 2d 347) (1971) and cits.; Jones v. Leverette, 230 Ga. 310, 311 (196 S.E. 2d 885) (1973). This burden is to be carried by the preponderance of evidence. Walker v. Johnston, 312 U.S. 275 (5) (61 SC 574, 85 LE 830) (1941). 'On habeas corpus proceedings, the same presumptions are indulged in favor of the validity of the judgment as are

indu[illegible]d in other collateral assaults on [illegible]judgment. Therefore, both the judgment and sentence are presumptively valid and a judgment of conviction, being presumed to be correct, may not lightly be set aside.' 14 EGL 151, Habeas Corpus, Section 42 (1978 Rev.) and cits.; Parrott v. State, 134 Ga. App. 160 (1) (214 S.E. 2d 3) (1975). It has also been held that a strong presumption obtains that defense counsel was competent, and that a movant for post-conviction relief bears the burden of proving otherwise. Walker v. State, 567 SW 2d 398 (Mo. App. 1978)." Crawford v. Linahan, 243 Ga. 161 (____ S.E. 2d ____). And as to presumption in favor of the conviction in habeas corpus cases, see also: Brand v. Wofford, 230 Ga. 750, at pp. 752, 753 (199 S.E. 2d 231), and cits.

"'General rules of evidence controlling the weight and sufficiency thereof apply in habeas corpus proceedings, as, for example, with regard to the determination of such issues and matters, among others, as deprivation of constitutional privileges. ...' 14 EGL 151, Habeas Corpus, Section 43 (1978 Rev.), citing, inter alia, Weiss v. Hood, 200 Ga. 795 (38 S.E. 2d 559) (1946), cert. den., 329 U.S. 759 (67 SC 112, 91 LE 645) (1946). As we have pointed out hereinabove, the petitioner had the burden of proof of a denial of her constitutional rights by a preponderance of evidence, and the trial judge, as the trior of facts, could reject her testimony in whole or in part. Given the presumption in favor of the competency of counsel, we cannot say that the habeas corpus judge was not authorized to disbelieve the petitioner's testimony that her counsel, whose competency on the trials was not attacked, had failed to advise her of her rights of appeal." Crawford v. Linahan, supra, at page 167.

I.

The first point to be discussed as raised by Defendant Machetti was that she was denied the effective assistance of competent counsel, uncorrected by any state official, and ability to prepare her defense in violation of her rights under the Sixth and Fourteenth Amendments to the Constitution of the United States, and Art. I, Sec I,

Paragraph XI of the Constitution of the State of Georgia.

A. The Petitioner's major contention in her petition for a writ of habeas corpus is that she received ineffective assistance of counsel during her trial. Before addressing the specific allegations made by the Petitioner in support of her contentions, this Court will discuss the circumstances surrounding the hiring of Petitioner's trial counsel, Mr. Vane G. Hawkins, of Athens, Georgia. The Petitioner was unable to retain one attorney approached by her parents on her behalf because what Petitioner stated was an exceedingly high fee, which he requested for his retention. Petitioner's mother, Mrs. Sarah Zuber, then suggested that Mr. Vane G. Hawkins, with whom she had been personally acquainted for years, be retained to represent the Petitioner. The Petitioner agreed that Mr. Hawkins should be retained. It should be noted that based on Petitioner's parents' personal acquaintance with Mr. Hawkins, as well as the claims of the Petitioner herself with Mr. Hawkins, they were well aware of his age and legal experience at the time of his retention. Mr. Hawkins was a practicing attorney in Athens, Georgia, at the time of his retention to represent the Petitioner, and he presently continues to practice on a somewhat more limited basis at this time. The evidence shows that he has been involved in the practice of law since his admission to the Georgia Bar in 1933, and that approximately forty per cent (40%) of his law practice has involved criminal work and during these years of practice he has handled several murder cases. The evidence also shows that Mr. Hawkins agreed to represent the Petitioner for a $10,000.00 fee. Most of this $10,000.00 fee was paid by Petitioner's parents. It should also be noted that Mr. Hawkins represented the Petitioner from a period beginning on or about November 10, 1974, throughout her trial during the week of February 24, 1975, and on her appeal to the Supreme Court of Georgia, which affirmed the Petitioner's conviction in January of 1976. The evidence shows that both

the Petitioner and her mother, Mrs. Zuber, who paid the majority of attorney's fees for Petitioner, that they never requested that Mr. Hawkins withdraw from the case, or sought another attorney, either by seeking to obtain a replacement for Mr. Hawkins, or by seeking the appointment of replacement counsel from the court, through the entire period of this time. The evidence shows that this is true, not only for the pre-trial and the trial period, but the Petitioner continued to retain Mr. Hawkins for purposes of appealing her case.

Based upon the testimony and evidence presented to this Court at the habeas corpus hearing, and from the record and transcripts of Petitioner's trial in the Superior Court of Bibb County, Georgia, it is apparent that Mr. Hawkins took substantial steps in the preparation for his representation of the Petitioner at her trial, and filed numerous motions on her behalf which he felt were necessary to aid in her defense. He attempted unsuccessfully to plea bargain with the District Attorney who refused to enter into any plea negotiations. The evidence shows that Mr. Hawkins acquired the services of a law student at the University of Georgia to do legal research for him on certain topics specifically relating to Petitioner's case, including the law concerning corroboration. Mr. Hawkins later submitted a Brief to the Supreme Court of Georgia on this point.

Also, Petitioner's attorney made arrangements with Mr. Floyd M. Buford, a Macon attorney who represented the Petitioner's husband during his trial, to use his office facilities in Macon, Georgia, during Petitioner's trial. He also borrowed one of Mr. Buford's secretaries, as well as his own personal secretary, to work with him on his trip to Macon during his preparation for the Petitioner's case. Petitioner's attorney made daily conferences with Mr. Buford and other members of Mr. Buford's firm, in which they consulted concerning trial strategy. Also, Mr. Hawkins

attended the entire prior trial of Petitioner's husband, in which the State produced essentially the same evidence as was produced at Petitioner's trial, and he obtained a portion of the record of Petitioner's husband's trial in which he felt would be helpful in preparing for Petitioner's case. The Petitioner's attorney, Mr. Hawkins, had numerous discussions with the Petitioner prior to the trial, both in person in the Bibb County Jail, and by telephone. The evidence shows in this case that Petitioner's attorney made at least a dozen visits to the Bibb County Jail to talk with Petitioner. The evidence also shows that Petitioner's attorney talked with Petitioner almost daily during the time she was in the Bibb County Jail, and that she was authorized to call him, collect, at any time.

Before the trial, Mr. Hawkins filed several motions on behalf of his client, including a Motion for Severance, Motion for Continuance, a Demurrer to the Indictment, a Motion for Continuance, Order Requiring the District Attorney to Furnish Addresses of State's Witnesses, and a Motion for Ruling that the Death Penalty is not an issue in the case. The attorney also submitted Request to Charge to the trial court on various principles of law. In conclusion, from the testimony and evidence presented to this Court, it is clear that the Petitioner's attorney, Mr. Vane G. Hawkins, adequately prepared for the trial of the Petitioner.

B. The Petitioner's first contention in support of her allegation that she received ineffective assistance of counsel during her trial was that Petitioner's counsel at trial refused to request a change of venue, even though Petitioner's husband had been convicted in the same court only 24 days before her trial and even though there was much adverse publicity in the community, which jeopardized her chances for a fair trial. The testimony and evidence showed that the majority of the jurors had not

read the publicity concerning the case, or if they had, they stated that it had not affected their opinion as to prevent them from rendering an impartial verdict. This conclusion by this Court is based on examining the voir dire of the jury panel of the Petitioner's trial.

"'The single purpose for voir dire is the ascertainment of the impartiality of jurors, their ability to treat the cause on the merits with objectivity and freedom from bias and prior inclination. The control of the pursuit of such determination is within the sound legal discretion of the trial court, and only in the event of manifest abuse will it be upset upon review.' Whitlock v. State, 230 Ga. 700, 706 (198 S.E. 2d 865) (1973)." Hall v. The State, 243 Ga. 207 (____S.E. 2d ____).

In Irwin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639 (1961) held: "The failure to accord an accused a fair hearing violates even the minimal standards of due process. In re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682; Tumey v. State of Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749. A fair trial in a fair tribunal is a basic requirement of due process. In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942. In the ultimate analysis, only the jury can strip a man of his liberty or of his life. In the language of Lord Coke, a juror must be indifferent as he stands unsworn. Co. Litt. 155 B. The verdict must be based upon the evidence developed at the trial. Thompson v. City of Louisville, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed. 2d 654. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the Defendant, or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416 (1807). The theory of law is that the juror who has formed an opinion cannot be impartial. Reynolds v. United States, 98 U.S. 145, 155, 25 L.Ed. 254.

It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, wide-spread, and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of the best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. Spies v. People of State of Illinois, 123 U.S. 131, 8 S.Ct. 22, 31 L.Ed. 80; Holt v. United States, 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed. 1021; Reynolds v. United States, supra. ... It was, therefore, the duty of the Court of Appeals to independently evaluate the voir dire testimony of the impaneled jurors."

The law is extremely clear in Georgia as to what shall warrant or demand a change of venue for one charged with an offense that is a violation of a law in the State of Georgia. "Code Ann. Sect. 27-1201 (Ga. L. 1972, p. 536) provides for a change of venue in any criminal case where (1) an impartial jury cannot be obtained, or (2) there is a probability or danger of violence." Reaves v. State, 242 Ga. 542, 547 (____S.E. 2d ____). A change of venue is mandatory and must be granted, if the evidence presented in support of the motion shows that there is reasonable probability of violence being committed against a defendant in the county where the crime was allegedly committed. See Kennedy v. State, 141 Ga. 314 (80 S.E. 1012); Graham v. State, 141 Ga. 812 (82 S.E. 282); Coggeshall v. State,

33 Ga. App. 613 (126 S.E. 568); Avery v. State, 83 Ga. App. 700 (64 S.E. 2d 589); Frazier v. State, 81 Ga. App. 840 (60 S.E. 2d 253); and Ledford v. State, 107 Ga. App. 244, 245 (129 S.E. 2d 555). A motion for a change of venue based upon the ground that an impartial jury cannot be obtained in the county where the crime was allegedly committed is to be determined after the hearing of evidence and finding of facts in the matter and there must be evidence to show that some particular thing will prevent defendant obtaining a fair and impartial jury. "Mere reference to the defendant in a newspaper article does not demand a finding that a need for change of venue exists." Biggers v. State, 171 Ga. 596 (156 S.E. 201). And even though there is "evidence of a fair amount of publicity addressed to the defendant and the crime with which he is charged" the evidence must show that a fair and impartial jury cannot be obtained by "clear and convincing evidence" and there must be "evidence that such publicity will prevent obtaining a fair and impartial jury." See Pierce v. State, 125 Ga. App. 490, 491 (188 S.E. 2d 181). "Georgia does not precisely follow the standards for granting a change of venue or continuance as set forth in ABA Minimum Standards Sect. 3.2 (c) (if there is a "reasonable likelihood" that a fair trial cannot be had then the motion should be granted. "A showing of actual prejudice shall not be required") and as established in the federal cases cited by Appellant to the same effect. E.g. Sheppard v. Maxwell, 384 U.S. 333 (86 SC 1507, 16 LE2d 600); Rideau v. Louisiana, 373 U.S. 723 (83 SC 1417, 10 LE2d 663); Irvin v. Dowd, 366 U.S. 717 (81 SC 1639, 6 LE2d 751); Marshall v. United States, 360 U.S. 310 (79 SC 1171, 3 LE2d 1250). The Georgia Supreme Court has consistently followed the rule conceived in Morgan v. State, 211 Ga. 172 (1) (84 SE2d 365) that a change of venue or a continuance will not be granted upon a mere showing that publications were made denunciatory to the

defendant without further proof that the jurors summoned to hear the case had actually been exposed to the publicity and had formed fixed opinions as to the guilt or innocence of the defendant that would not yield readily to testimony. And "the granting or the refusing of a motion for a change of venue, is within the discretion of the trial judge. Such discretion will not be controlled by the appellate courts unless abused." McCrary v. State, 229 Ga. 733, 734 (194 S.E. 2d 480); Thacker v. State, 226 Ga. 170 (2) (173 S.E. 2d 186); Park v. State, 225 Ga. 618 (1) (170 S.E. 2d 687); Williams v. State, 222 Ga. 208, 209 (149 S.E. 2d 449); Chatterton v. State, 221 Ga. 424 (4) (144 S.E. 2d 726). ..." Butler v. State, 134 Ga. App. 131, 132, 133 (1) (213 S.E. 2d 490). See also Krist v. Caldwell, 230 Ga. 536, 537 (198 S.E. 2d 161), and Dutton v. State, 228 Ga. 850, 852 (188 S.E. 2d 794).

It has also been held: "... that if the atmosphere surrounding the trial is sufficiently inflammatory the court should disregard prospective jorors' statements of impartiality. See Murphy v. Florida, 421 U.S. 794 (95 SC 2031, 44 LE2d 589) (1975); Estes v. Texas, 381 U.S. 532 (85 SC 1628, 14 LE2d 543); Irvin v. Dowd, 366 U.S. 717 (81 SC 1639, 6 LE2d 751)..." Reaves v. State, supra, p. 549 and as was said there and the same seems to apply to the instant case: "The atmosphere surrounding this trial was not comparable to the situations in any of the above-cited U.S. Supreme Court cases."

Petitioner cites no authority to show that there was sufficient factual basis to warrant Counsel making a request for a Change of Venue and certainly no authority to show or substantiate that the fact that Petitioner's Counsel was ineffective for Petitioner by making no request or motion for Change of Venue.

Therefore, it appears to this Court in applying the principles as set forth in the aforementioned Irvin v. Dowd case, and other authorities cited, that upon a

fair review of the voir dire of Petitioner's trial and from all of the evidence presented to this Court, the contention of the Petitioner as to ineffectiveness of counsel because Counsel refused to request a change of venue, is without merit.

C. Petitioner alleges that her attorney was ineffective in that he conducted an inadequate voir dire examination of prospective jurors. The evidence shows that the Petitioner's attorney adequately questioned the prospective jurors concerning the possible effect of pre-trial publicity on them. It is also noted by this Court that the jurors were questioned as to their possible conscientious objection to the imposition of the death penalty. Mr. Hawkins, the Petitioner's attorney, questioned the jurors concerning such matters as employment, marital status, number of children, their ages, acquaintance with the District Attorney and investigator of the case, Chief Deputy Ray Wilkes, religious preferences, and the area of their residence. He also asked questions relating to the trial, such as whether a juror would be biased if the Defendant did not take the stand, whether a juror wanted to hear both sides or believed there were two sides to every question, whether a juror had ever served on a criminal jury, and whether a juror understood reasonable doubt. Also, the District Attorney asked certain statutory questions to the panel, including questions concerning whether they have served on a Grand Jury, or whether related to the Defendant, the victims, or the prosecutor. It appears to this Court that prior to conducting the voir dire examination of the jury in Petitioner's case, the Petitioner's attorney employed his secretary from Mr. Floyd Buford's office in Macon to work up the jury list and obtain all possible information concerning the jurors. Also, the evidence shows that the Petitioner's attorney was successful in eliminating prospective jurors which might have had pre-conceived bias

against the Petitioner, and that prior to the voir dire he had formulated a list of questions which he felt would be proper to ask during voir dire.

Voir dire examination is not unlimited or without restrictions under the laws of Georgia. "The single purpose for voir dire is the ascertainment of the impartiality of jurors, their ability to treat the cause on the merits with objectivity and freedom from bias and prior inclination." Whitlock v. State, 230 Ga. 700, 706 (198 S.E. 2d 865). See also Shouse v. State, 231 Ga. 716, 717 (2) (203 S.E. 2d 537). But, "Hypothetical questions involving evidence or requiring a response from a juror which might amount to a prejudgment of the case are improper and should be excluded from the examination of prospective jurors. Evans v. State, 222 Ga. 392, 401 (150 S.E. 2d 240)." Pinion v. State, 225 Ga. 36, 37 (4) (165 S.E. 2d 708). "While a juror should come to the consideration of a criminal case unaffected by any previous judgment or opinion, as to any material fact in issue to be tried, relating to the parties, the subject matter, or the credibility of the witnesses" (Roberts v. State, 4 Ga. App. 378 (1) (61 S.E. 497)), the mattersreferred to are matters as to the particular case, that is, the ieeue, the parties, the subject matter and the particular witnesses in the case to be tried. Id (2). Jacobs v. State, 1 Ga. App. 519 (57 S.E. 1063); McKay v. State, 6 Ga. App. 525 (65 S .E. 306); Bryan v. State, 124 Ga. 79 (52 S.E. 298); Jones v. Cloud, 119 Ga. App. 697, 707 (168 S.E. 2d 598). And see also: McNeal v. State, 228 Ga. 633, 635 (187 S.E. 2d 271), and White v. State, 230 Ga. 327, 336 (196 S.E. 2d 849). "Technical legal questions in regard to presumption of innocence are improper. McNeal v. State, 228 Ga. 633, 636 (187 S.E. 271)." Goughf v. State, 232 Ga. 178, 181 (1-c) (205 S.E. 2d 844). "Also a trial judge has authority to prohibit the jurors being asked such questions as would require them in effect to prejudge the

case. Atlanta Joint Terminal v. Knight, 98 Ga. App. 482 (4) (106 S.E. 2d 417, 79 ALR 2d 539); Jones v. Parrott, 111 Ga. App. 750 (2) (143 S.E. 2d 393); Gunnin v. State, 112 Ga. App. 720 (2) (146 S.E. 2d 131); Evans v. State, 222 Ga. 392, 401 (150 S.E. 2d 240)." Bowens v. State, 116 Ga. App. 577, 578 (4), and 579 (5), and 580 (6) (158 S.E. 2d 420).

The Petitioner suggests the various questions which she felt should have been asked during voir dire. In Estes v. Perkins, 225 Ga. 268 (167 S.E. 2d 588) held: "While another lawyer or other lawyers, had they represented the petitioner upon her trial, might have conducted her defense in a different manner, and might have exercised different judgments with respect to the matters referred to in her petition, the fact that her attorneys chose to try the petitioner's case in the manner in which it was tried and made certain decisions as to the conduct of her defense with which she and her peresntly employed attorneys now disagree, does not require a finding that their representation of the petitioner was so inadequate as to amount to a denial to her of the effective assistance of counsel." See also: Johnson v. Caldwell, 228 Ga. 776 (187 S.E. 2d 844) (1972); Bright v. State, 137 Ga. App. 404 (224 S.E. 2d 71) (1976); and Howell v. State, 139 Ga. App. 556 (228 S.E. 2d 723) (1976). It is this principle which was espoused in the Estes case apprised to the present case before this Court as to the various questions which the Petitioner asserts should have been asked during voir dire of her trial.

Certain of the voir dire questions, that Petitioner's Counsel now says Petitioner urged her counsel at the trial to ask potential jurors and since the same were not asked says that Petitioner's rights were violated, were actually improper questions that would not have been allowed, and even if allowed would not have in and of itself disqualified a potential juror, such as: (a) "What verdict was reached in previous capital cases when you sat on the jury?" (Petitioner's Counsel critically contends the Petitioner's counsel at trial failed to object when he was precluded from asking this question of veniremen). The disallowance of this specific question to prospective jurors as to their previous service on any jury that had returned a death penalty verdict was held not to be an abuse of the Court's discretion. See Thacker v. State, 226 Ga. 170, 171 (6), at pp. 176-177 (173 S.E. 2d 186). And (b), "If the juror believed that the death penalty should be imposed on a person convicted of murder?" This question may or may not have been allowed in view of the required statutory and case law questions required to be asked of all jurors and certainly would not have, in and of itself, been sufficient to disqualify the juror. Therefore, this Court concludes the contention of the Petitioner as to ineffectiveness of counsel because Counsel conducted an inadequate voir dire examination of prospective jurors, is without merit.

D. The Petitioner also contends that under the general category of ineffective assistance of counsel that Petitioner's counsel at trial failed to subpoena, despite Petitioner's urging, a witness who could have and was to

have testified in direct contradiction to much of the testimony of the chief prosecution witness, and who could have cleared Petitioner of involvement of the crimes, and disappeared only three days before Petitioner's trial. In conjunction with the allegation, the Petitioner also contends ineffective assistance of counsel because Petitioner's counsel failed to move for a continuance until the witness in question could be relocated, even though Petitioner begged him to do so. The Petitioner contends that a witness, namely one of her daughters, Vickie Akins, could have been subpoenaed to testify in her behalf, and that when Vickie Akins disappeared prior to her trial, Mr. Hawkins, the Petitioner's attorney, was ineffective in not requesting a continuance in order to attempt to locate her. Petitioner further contends that Vickie could have impeached the testimony of the main witness for the State, John Maree. The evidence shows that Petitioner's attorney made the decision not to subpoena any of the Petitioner's three daughters because he felt that there was no need to subpoena them. The three girls had been extremely cooperative, and he felt that they could appear at the trial without the necessity of a subpoena. The evidence also shows that Petitioner's mother also assured him that she would have the girls in Macon for the trial. A reason behind Petitioner's attorney's decision not to subpoena Vickie and her two other sisters was that he did not want to put the District Attorney on notice that he was going to call Petitioner's daughters as witnesses. From the testimony and evidence presented to this Court it seems very clear that a personal relationship between Vickie Akins and John Maree, the major State's witness, could be a reason for her not to have attended the trial of her mother. Also, it appears that Vickie's disappearance from the home of Mrs. Zuber prior to Petitioner's trial indicated that she decided not to cooperate with Petitioner's attorney, as she had originally indicated, and that she

would not be present to impeach the testimony of John Maree. Also, it appears to this Court from the testimony and evidence presented that Petitioner's attorney made a tactical decision not to subpoena Vickie Akins that was reinforced by her unwillingness to testify. Also, Petitioner's claim that her daughter could have impeached John Maree's testimony is unsupported except by her own atement. In Pitts v. Glass, 231 Ga. 638 (203 S.E. 2d 515), the Supreme Court of Georgia held: "The right to effective counsel means reasonably likely to render and rendering reasonably effective assistance, not errorless counsel and not counsel judged ineffective by hindsight." This principle seems to apply in this case, this allegation raised by the Petitioner. Therefore, the contention of the Petitioner is without merit. "...A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place without the county that is within 150 miles of the place of the hearing or trial specified in the subpoena." Ga. Code Ann. Sect. 38-801)e). According to the evidence, some of which has already been stated, Petitioner's Counsel felt there was no need to subpoena the three girls (daughters of Petitioner), who had been extremely cooperative and he felt they would appear at trial without the necessity of a subpoena and the grandmother, Mrs. Zuber, had assured Counsel that she would have the girls at the trial and that he did not want to put the district attorney on notice that he was going to call Petitioner's daughters as witnesses. When the daughters disappeared it may have been better that they had not been subpoenaed because the fact that they left was probably indication that they no longer desired to testify. This could have created hostile witnesses that would have been of no value, or if subpoenaed but not present though a continuance could have been requested, it would have been to no avail but for purposes of delay only, or would have

presented a situation if the witnesses had been subpoenaed, then left and no continuance sought for the district attorney to have commented on the absence of the witnesses which could have harmed Petitioner instead of helping her. After the girls disappeared there was no way of knowing whether they were within the 150 miles distance limitation on witnesses subject to subpoena. No continuance could have been granted based upon the absence of a material witness or material witnesses, where the same had not been properly served. Cf. Eady v. The State, 129 Ga. App. 656 (200 S.E. 2d 767) (1974), and cit. Concerning the failure of Petitioner's attorney to move for continuance until Vickie Akins was located, it appears to this Court there was no legal basis to ask for a continuance as Vickie Akins was not under a subpoena. None of the eight statutory requirements under Ga. Ann. Code Sect. 81-1410 is shown by Petitioner in the instant case that is required in order for a continuance to be granted for the absence of a witness. See Alderman v. State, 241 Ga. 502 (2) (____S.E. 2d ____), and cit. Nowhere in the petition, as amended, is it set out what the witness or witnesses would have testified to, as being favorable to the defendant, and that such witness' testimony could have been procured had a continuance been requested and granted and nowhere is it shown as to what injury or harm has come to Petitioner as a result of the failure of same. Therefore, this contention raised by the Petitioner as to ineffectiveness of counsel because he failed to subpoena certain

witnesses at Petitioner's trial despite the urging of Petitioner, is without merit.

E. Petitioner contends further that she had ineffective assistance of counsel because Petitioner's counsel failed at the trial to call for questioning other witnesses who were present or to subpoena others that Petitioner urged him to secure who could have impeached the testimony of the chief prosecution witness or other witnesses for the prosecution, or supported Petitioner's testimony. Petitioner testified at the habeas corpus hearing that she supplied impeaching evidence concerning John Maree to Petitioner's attorney, such as the fact that John Maree was a member of organized crime, but claims that Petitioner's attorney did not use this information. The evidence shows that Petitioner's attorney was not given any impeachment information concerning John Maree by the Petitioner. The evidence also shows that the Petitioner's attorney entered all the evidence he had on the guilt phase of the trial. The mere fact that Petitioner's trial counsel did not present all evidence which, assuming it was available at the time of her trial, would have, when viewed in retrospect, been helpful to Petitioner's case, does not constitute ineffective assistance of counsel. Petitioner's attorney contends that he was not in possession of such evidence or had any information from Petitioner as to such evidence. This Court tends to believe the testimony of Petitioner's attorney in this case of this issue.

In Young v. State, 239 Ga. 53, 60 (236 S.E. 2d 1) (1977), the Court commenting on Pitts v. Glass, supra, said: "In Pitts v. Glass, 231 Ga. 638, 639 (203 S.E. 2d 515) (1974), this Court quoted approvingly from MacKenna v. Ellis, 280 F2d 592, 599 (5th Cir. 1960): 'We interpret the right to counsel as the right to effective counsel. We interpret counsel to mean not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance.' (Emphasis supplied.)."

Also it seems that who Petitioner's counsel called as witnesses was a question of trial strategy and would be the same as a complaint by one that his counsel should have advised him as defendant to take the witness stand at the trial such as the Court held in Young v. Ricketts, 242 Ga. 559, 560 (____S.E. 2d ____) (1978): "A complaint against appellant's privately retained counsel that he ... should have advised appellant to take the witness stand at the trial ... involved a question of trial strategy. ..." Hayes v. Russell, 405 F2d 859 (6th Cir. 1969). Accord, United States v. Dingle, 546 F2d 1378 (10th Cir. 1976); Sims v. Lane, 411 F2d 661 (7th Cir. 1969); Hudgins v. United States, 340 F2d 391 (3d Cir. 1965); Newsom v. Smyth, 261 F2d 452, 454 (4th Cir. 1958); United States v. Garguilo, 324 F2d 795 (2d Cir. 1963); Palakiko v. Harper, 209 F2d 75 (9th Cir. 1953). But see United States v. Johnson, 555 F2d 115 (3d Cir. 1977)." Therefore, the contention of the Petitioner as to ineffectiveness of counsel because he

failed to call for questioning other witnesses who were present or subpoenaing other witnesses which Petitioner urged him to secure, is without merit.

F. The next issue raised by the Petitioner under the general contention of ineffective assistance of counsel is that Petitioner's counsel at trial failed to move to suppress evidence seized in violation of Petitioner's rights under the Fourth Amendment to the United States Constitution. The Petitioner testified at the habeas corpus hearing that she was forced under coercion from law enforcement officials to sign a piece of paper authorizing a search of her home in Miami, Florida, after her home had already been searched. This was denied by the Assistant District Attorney, Mr. Donald Thompson, who was present at the time that the search was conducted. The evidence showed that the purpose of going to Petitioner's home in Miami, Florida, was to serve an arrest warrant, not to search the home. It appears to this Court that the search was made at the home following the giving of consent by the Petitioner. There is no direct evidence that Mr. Thompson, or anyone else in his presence, threatened the Petitioner in order to get her to sign a consent for the premises to be searched. Therefore, there is a basic conflict between the testimony of the Petitioner and the law enforcement officers as to whether or not there was in fact a Fourth Amendment violation resulting from the search of her house. This Court tends to believe the testimony of the law enforcement officials.

The evidence shows that Petitioner's attorney objected quite a number of times as to pieces of evidence being admitted and was upheld on certain of his objections. When asked if he had ever filed a formal Motion to Suppress, the Petitioner states that her attorney was not responsive. However, from the evidence presented to this Court, he did not file such a motion because he knew what evidence the State had. He indicates to this Court that he did not make

a formal motion because he did not feel there was any evidence which would be subject to a formal Motion to Suppress. The mere fact that Counsel failed to make objection to evidence or to apply some other tactic, or did some things contrary to the judgment of present counsel representing the accused, does not justify applying to him the brand of incompetence. Dent v. The State, 136 Ga. App. 366 (221 S.E. 2d 228). In habeas corpus case, the Judge is the trier of facts, and may determine which testimony of which witnesses is to be credited. Anglin v. Caldwell, 227 Ga. 584 (182 S.E. 2d 120). These aforementioned principles apply to the Petitioner's case and, therefore, from the evidence presented to this Court, the contention of the Petitioner as to ineffectiveness of counsel because he failed to move to suppress certain evidence she contended was seized in violation of her rights under the Fourth Amendment to the United States Constitution, is without merit.

G. The next issue raised by the Petitioner is that Petitioner's Counsel at trial failed to make proper objections, or to request that arguments or motions, objections, and other similar matters, be conducted outside the presence of the jury. The Petitioner contends there are various objections that should have been made in her trial. The Petitioner also contends several instances in which she feels that discussions which were there between Counsel and the Court should have been made outside the jury's presence. However, looking at the evidence presented to this Court, it ia apparent that the Petitioner's attorney made numerous appropriate objections during the trial. Also, Petitioner's attorney did request several bench conferences outside the presence of the jury. He discussed Requests to Charge outside the presence of the jury. He also asked the jury to retire when he argued a motion before the Court concerning the testimony about the insurance. In Fannon v. The State, 142 Ga. App. 658 (236 S.E. 2d 698),

the Court held: "The mere fact that every conceivable objection to evidence was not raised or that present counsel would have cross-examined the state's witnesses differently does not establish ineffectiveness of counsel." See also: Hart v. State, 227 Ga. 171 (179 S.E. 2d 346). Therefore, the contention of the Petitioner as to ineffectiveness of counsel because he failed to make proper objections or to request that arguments, or motions, objections and other similar matters be conducted outside the presence of the jury, is without merit.

H. The next issue raised by the Petitioner as to ineffective assistance of counsel is that Petitioner's Counsel at her trial prejudiced her case by referring to the recently preceding trial of her husband on the same charges. The Petitioner cites references to the Anthony Machetti's trial on voir dire by Petitioner's trial counsel as being prejudicial to her. Examination of the references reveal that Petitioner's Counsel did not refer to Petitioner's husband's trial in terms of Anthony Machetti's trial, but merely asked concerning these questions of the jurors on the effect of pre-trial publicity upon them, whether they had read any publicity relating to this case, or a companion case, in the papers. In some instances in questioning the jorors concerning pre-trial publicity, Petitioner's Counsel would ask them had they read anything in the newspapers related to these trials. It appears to this Court from the testimony and evidence presented that the questioning of jurors concerning pre-trial publicity was not only non-prejudicial, but necessary in order to eliminate jurors who might have been adversely affected in Petitioner's case, based upon their exposure to publicity concerning the former trial of Petitioner's husband. It also appears to this Court that because examination of John Maree, his references to Mr. Maree's testimony in the previous trial were merely for purposes of impeaching

Mr. Maree's testimony at the Petitioner's trial. Petitioner's Counsel referred to the attempt to impeach Mr. Maree's testimony by showing that he was not making consistent statements at this trial, with those he made as a matter of public record, at the previous trial, it would appear to this Court this just might have constituted ineffectiveness of counsel. However, Petitioner's Counsel's references to this former trial of Petitioner's husband was made for specific purposes, and any prejudice which might have resulted from these references was out-weighed by their value as an attempt to eliminate biased jurors from the panel and their use as an attempt to impeach the testimony of John Maree. Before a final conviction can be set aside on the ground of incompetency or ineffective counsel, it must appear that the trial was a farce or mockery of justice, or was shocking to the conscience of the reviewing court. Heard v. The State, 126 Ga. App. 62 (189 S.E. 2d 895). Therefore, the contention of the Petitioner as to ineffectiveness of counsel because he prejudiced her case by referring to the recent preceding trial of her husband on the same charges, is without merit.

I. The next issue raised by the Petitioner is that Petitioner's Counsel failed to object to the fact that Petitioner was frequently not allowed to telephone him long distance at his request, that her telephone calls to him were monitored, and that she was repeatedly refused the right to have him present when she was interrogated before the trial. Irene Morris, head matron of the Bibb County Jail, testified by way of deposition at the habeas corpus hearing about the general procedures concerning jail phone calls, and specifically as to Petitioner's use of the telephone during her incarceration at the Jail. Mrs. Morris explained generally, that women prisoners are allowed to make one phone call per week to their family or to a personal friend, and she stated that the telephone

is made available to them to contact their attorney at any time other than after we realize that it is after the attorney's office hours, unless it is an emergency. A prisoner can contact the attorney at his home, or if the attorney advises us in advance that it will be all right for her to call said attorney. Mrs. Morris went on to discuss telephone procedures relating specifically to Petitioner, stating that they gave her privileges not ordinarily given in other cases. Mrs. Morris stated that often Petitioner's mother would call and that the matron would allow Petitioner to accept these calls from her mother, or return these calls. Mrs. Morris testified that to her knowledge, Petitioner was never denied the right to call her attorney. Mrs. Morris testified that Petitioner's telephone calls were not monitored, as there was no recording of telephone calls at the Jail. Concerning the receiving of visitors, Mrs. Morris testified that unless an attorney arrived during meal time they were never refused the right to see their client. Mrs. Morris stated that attorneys are allowed to visit their clients in a conference room, in which they communicate with their client by telephone. Mrs. Morris renders impossible the Petitioner's contentions that her visits were monitored, by her testimony that although there was a monitoring system installed in the visiting area, it was never made operational because it was ruled out. Petitioner's attorney's testimony was consistent with Mrs. Morris' testimony, in that he stated that to his knowledge neither his conversations with the Petitioner at the Bibb County Jail, nor his telephone conversations with her, were monitored by any of the authorities. Petitioner's attorney stated that he felt that he would have known if his conversations had been monitored. He added that the matrons allowed the Petitioner to call him at any time. Mr. Donald Thompson, an Assistant District Attorney, stated that to his knowledge there were no tapes made of any conversations of the Petitioner during

ber incarceration in the Bibb County Jail. Petitioner alleges that she was repeatedly refused the right to have Mr. Hawkins present during pre-trial interrogations by the police. This allegation is denied by Petitioner's attorney who stated that he did not believe that Mrs. Machetti was ever interrogated by any officer after his retention as counsel. This is also corroborated by testimony of Mr. Donald Thompson who stated that he knew of no questioning by police, following Petitioner's retention of Mr. Hawkins at which Mr. Hawkins was not present. As mentioned earlier, Petitioner's attorney stated that he had almost daily telephone conversations with the Petitioner, and made several trips to the Bibb County Jail to confer with her in order to prepare for her trial. Therefore,this Court concludes, based on the above mentioned testimony and the evidence, that this contention of Petitioner as to ineffectiveness of counsel because he failed to object to her not being allowed to use the telephone, or to prevent her calls from being monitored, and her being refused the right to have her counsel present when she was interrogated, is without merit.

J. The next issue this Court will examine under the general heading of ineffective assistance of counsel, is the allegation by Petitioner that Petitioner's Counsel at trial failed to question the co-Defendant who testified against the Petitioner, as to any promise of sentence reduction or other reward in exchange for his testimony. Petitioner contends that it was error for her attorney during her trial to fail to ask John Maree concerning any promise of sentence reductions or plea bargaining in exchange for his testimony against the Machettis. The Petitioner states that Mr. Hawkins did not ask John Maree about his expectations. In fact, Mr. Hawkins did question John Maree about his future plans during his cross-examination of Mr. Maree when he questioned him about getting a

passport and leaving the country, and further questioned his plan about marrying Vickie and buying a farm when you get out of this mess. Mr. Hawkins tried continually to undermine Mr. Maree's credibility by questioning his character, specifically in regard to being a divorced man with four children, one child approximately the same age as Vickie, with whom he had sexual relations on several occasions, and by questioning him of Mafia connections, and by questioning him concerning making up the fish story and why Mr. Maree did not come forward and go to the police in the middle of August and tell them about the supposed threat against Mr. Maree's family. Petitioner's attorney questioned Mr. Maree concerning his previous contact with law enforcement officers. The Petitioner's attorney further questioned Mr. Maree about why he did not first tell the police officers his story when he was picked up in Florida on October 15, 1974. The Petitioner's attorney throughout this lengthy cross-examination of Mr. Maree tried to impeach Mr. Maree's testimony. In Hawes v. State, 240 Ga. 327 (____S.E. 2d ____), the Supreme Court of Georgia held: "The decisions on which witnesses to call, whether and how to conduct cross-examinations, what jurors to accept or strike, what trial motions should be made, and all other strategies in practical tactical decisions, are the exclusive province of the lawyer after consultation with his client. Reid v. State, 235 Ga. 378 (319 S.E. 2d 740, 742) (1975), 30 ABA Standards, Relating to the Administration of Criminal Justice, 1974, The Defense Function, Section 5.2B." It is true that if a promise of immunity or favored treatment had been made with co-Defendant John Maree, when he was called to testify as a witness then Petitioner's Counsel would have had a right to show this at trial and comment on it during argument. See Parker v. State, 3 Ga. App. 21 (59 S.E. 204). The Court of Appeals of Georgia has also held: "Evidence of any understanding or agreement as to a future prosecution of an accomplice, on whose

testimony the state's case almost entirely depends, is relevant to his credibility; the jury is entitled to know of it; the prosecutor has a duty to disclose it; and the failure to make this disclosure violates due process and requires the reversal of the conviction and a remand for a new trial." Allen v. State, _____Ga. App. _____ (_____S.E. 2d _____). Masterson v. State, 128 Ga. App. 361 (196 S.E. 2d 660). See also and compare: Evans v. State, 222 Ga. 392 (16) at pp. 402-403 (150 S.E. 2d 240); and Cauley v. State, 130 Ga. App. 278, at pp. 294-296 (203 S.E. 2d 239). There seems to be no evidence of any such agreement between Witness Maree and the Prosecutor on behalf of the State and therefore there has been no failure of disclosure as would require the grant of a new trial under the aforesaid authorities. Likewise there seems to be no evidence in view of Counsel for Petitioner in his conduct in questioning Witness Maree that would amount to ineffectiveness of counsel. Applying these legal standards to the facts and evidence presented in this case as found in the record before this Court, this Court concludes the contention of the Petitioner as to ineffectiveness of counsel because he failed to question the co-Defendant who testified against Petitioner, as to any promise of sentence reduction or other reward in exchange for his testimony, is without merit. See: Adams v. The State, 236 Ga. 468 (224 S.E. 2d 32); Dobbs v. State, 235 Ga. 800 (221 S.E. 2d 576).

The Petitioner also contends that her Due Process rights were violated by John Maree not being questioned concerning possible plea bargaining nor by disallowing a copy of his statement to be provided by the State. Citing Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L. Ed. 2d 104, Petitioner argues that it was error for the State not to question John Maree concerning whether or not he had been given any promises in exchange for his testimony. In Giglio v. United States, supra, the Supreme Court held: (1) "Deliberate deception of a court and jurors by presentation of known false evidence is

incompatible to the demands of justice." (2) "The reliability of a given witness may well be determinative of guilt or innocence, non-disclosure of evidence affecting credibility falls within the rule that suppression of material evidence justifies a new trial, irrespective of good faith, or bad faith of the presentation." (3) "A new trial is not automatically required whenever the combing of the prosecutor's file after the trial has disclosed evidence possibly useful to the defense, but not likely to have changed the verdict; a finding of materiality of the evidence is required; a new trial is required if the false testimony could in any reasonable likelihood have affected the judgment of the jury." (4) "If Assistant United States Attorney, who first dealt with key Government witness, promised witness he would not be prosecuted if he cooperated with the Government, such a promise was attributable to the Government, regardless of whether attorney had authority to make it, and nondisclosure of promise, which was not communicated to Assistant United States Attorney who tried the case, would constitute a violation of due process." (5) "When Government's case depended almost entirely on testimony of a witness who was named as a co-conspirator, bur was not indicted, and without it there could have been no indictment and no evidence to carry case to jury, such witness' credibility was an important issue in the case and evidence of any understanding or agreement as to future prosecution would be relevant to such witness' credibility and jury was entitled to know of it." At the habeas corpus hearing the District Attorney testified he felt that Mr. Maree basically testified to the events as they occurred, and many of the things included in his testimony were corroborated with other evidence to support it. Mr. Hasty stated that he merely felt that Mr. Maree was telling things in such a way as to make him look less involved than he

actually was. Mr. Hasty further stated that it was never his intention to grant Mr. Maree immunity in the case, but that in fact he had told him the exact sentence that he expected that he would receive prior to his testimony in the Petitioner's case. In another portion of the District Attorney's testimony, Mr. Hasty stated that Mr. Maree tried to get him to grant him immunity at a later time, stating that if he had been in New Jersey he would not have received this sentence, but Mr. Hasty informed Mr. Maree that this was not done in this jurisdiction. The Petitioner contends that the facts of the Petitioner's case are identical to those in Giglio v. United States, supra, but with this allegation the Court must take exception with the contention of the Petitioner. In Giglio, a co-conspirator testified on cross-examination by the defense that no one had ever told him he wouldn'd be prosecuted, when in fact it was later discovered that he had been promised immunity from prosecution. The Court in Giglio, hinged its decision in granting a new trial on the holding in Napue v. Illinois, 360 U.S. 264 (79 S.Ct. 1173, 3 L. Ed. 2d 1217), in which the United States Supreme Court held that a new trial is required if "the false testimony could ... in any reasonable likelihood have affected the judgment of the jury. ..." Napue v. Illinois, supra, was also a case in which a principal State witness testified in response to a question by a State attorney that he had received no promise of consideration in return for his testimony. The State's attorney knew that this testimony was false but did nothing to correct it. It appears to this Court, the facts as they exist in the Petitioner's case are distinguishable from those in Giglio and Napue. First, there was no question from either the District Attorney or the defense counsel relating to plea bargaining by the State. There was no false statement on behalf

of th[redacted]-conspirator stating that he had[redacted]t received any promise concerning prosecution from the State. Also, there was not the fact situation as in Napue, where the State allowed false testimony into evidence, knowing it was false, but doing nothing to correct it. Petitioner's defense counsel could properly have cross-examined Mr. Maree concerning this if he deemed that it might be helpful to his client's case. Therefore, this Court sees no error in not asking Mr. Maree concerning any plea bargaining with the State. It appears from the District Attorney's testimony that any expectations Mr. Maree had concerning his own immunity from prosecution was based solely on his own expectations, not anything that the State had promised him. Specific attention is called to the duty of the State to disclose to the jury any promise of immunity or favored treatment to a Co-defendant testifying in the case in order that same might be considered as to credibility of the Co-defendant and the weight the jury should give to such evidence.

As to the statement made by Mr. Maree to Chief Deputy Ray Wilkes, although the Court stated that he would not require the prosecutor to furnish Petitioner's attorney with a copy of this statement, Petitioner's attorney did, in fact, have a copy of this statement which he used in cross-examining Mr. Maree in an attempt to impeach his testimony. Also, it appears to this Court that there was no prejudice to Petitioner in this case, as her trial counsel had a copy of this statement available to him for his use and did, in fact, use it in cross-examination. Therefore, this Court concludes this contention of the Petitioner is also without merit.

K. The next issue for this Court to determine under the general heading of ineffective assistance of counsel is the contention by the Petitioner that Petitioner's Counsel at the trial failed to object to the prosecution's inflammatory, misleading and prejudicial closing argument; and that Petitioner's Counsel at trial failed to object to or move to strike those parts of the prosecution's closing arguments which alleged "facts" not in the record. Also, the

Petitioner raises this issue that the prosecution's closing remarks were prejudicial and inflammatory and violated the due process of the general issue on a Motion for Habeas Corpus. This Court will now address all these issues at the same time.

The permissible scope of argument is very broad under Georgia law. See Bryant v. Caldwell, 484 F2d 65, 66 (1973), cert. denied 415 U.S. 481 (1974). In support of her contention that the prosecutor's closing argument violated her Due Process rights, the Petitioner contends that in his closing argument the District Attorney argued facts which were outside the purview of the evidence presented. The Petitioner cites references such as a statement made by the District Attorney concerning the fact that one of the victims, Juanita Akins, was a 26 year old school teacher who might have taught one of the juror's children. Ga. Code Ann. Section 24-3319 states: "Arguments of counsel shall be confined to the law and facts involved in the case then before the Court, on pain of being considered in contempt; and in all civil cases questions of law shall be argued exclusively to the Court, and questions of fact to the jury. Counsel shall not be permitted, in the argument of criminal cases, to read to the jury recitals of fact or the reasoning of the Court as applied thereto, in decisions by the Supreme Court or Court of Appeals." "This court has previously considered the propriety and legal effect of a prosecutor's arguing Eberhart v. State, 47 Ga. 598, 609-610 (1873) and although we have tried to discourage a reading of certain passages from this case we have held it is not error under the circumstances here. Hawes v. State, 240 Ga. 327 (240 S.E. 2d 833) (1977); Campbell v. State, 240 Ga. 352 (240 S.E. 2d 828) (1977); Presnell v. State, 241 Ga. 49, 62 (243 S.E. 2d 496) (1978); Drake v. State, 241 Ga. 583, 587 (247 S.E. 2d 57) (1978)." Ruffin v. State, 243 Ga. 95, 105 (____ S.E. 2d ____). Based on the aforementioned Ga. Code Ann. Section 24-3319, this Court does not feel the District Attorney's statement of fact that Juanita Akins might have taught one of the

juror's children was either improper or prejudicial. Petitioner also cites the portion of the argument in which the prosecutor describes the manner in which Petitioner's husband forced the other victim, Ronnie Akins, to stand with his hands spread eagle fashion on top of the car. It appears to this Court that this was a fact placed into evidence by the State's witness, John Maree. As for the section of the prosecutor's argument which related to the 1973 drug overdose account, it appears to this Court that this was, too, within the permissible state of argument in the Courts of Georgia. In Wisdom v. The State, 234 Ga. 650 (217 S.E. 2d 244), held: "Counsel is permitted, in the sound discretion of the court, to argue all reasonable inferences and deductions which may be drawn from the evidence however illogical they may seem to the opposite party. See, Wheeler v. State, 220 Ga. 535 (140 S.E. 2d 258), and Hightower v. State, 225 Ga. 681 (3) (171 S.E. 2d 148). The discretion of the trial court in handling these matters will not be disturbed on appeal except in clear cases of abuse. ..." The Petitioner contends that several portions of the argument relating to Ronnie Akins' work habits, statements concerning the investigation of the case, and statements concerning Ronnie Akins' provisions for his family and the making out of the insurance policy, were prejudicial to the Petitioner in this case. It appears to this Court there was evidence in the records concerning these matters. Mr. Akins' work record was in evidence in the form of his personnel record, which was State's Exhibit No. 18 at the trial. Mr. Ray Wilkes testified extensively concerning the investigation of the case. The District Attorney's argument concerning the divorce decree and the insurance policies were also in the evidence in the form of State's Exhibit Nos. 17, 19-A, and 19-B. It appears to this Court that the District Attorney was merely arguing reasonable inferences and deductions which could be drawn from the evidence which had been presented by the State,

in that such, this does not constitute a violation of Ga. Code Ann. Section 24-3319. As to the prosecutor's references to Dr. Genori, this Court feels that this, too, was within the scope of permissible argument that might be drawn by the jury in the testimony concerning the connection between Dr. Genori and the Petitioner. It also appears to this Court that the statement by the prosecutor during the penalty phase that he imagined that Juanita Akins wanted to start a family was another reasonable inference which could be drawn from the evidence. It also appears that the District Attorney's references to the Petitioner, although not technically facts, could be classified in the category of mere flight of oratory and perhaps false logic, which has been held not to constitute reversible error. In the case of Miller v. The State, 226 Ga. 730 (177 S.E. 2d 253), the Supreme Court of Georgia held: "The complaint generally is that the district attorney characterizes the appellant as a brute, beast, an animal, and a mad dog who did not deserve to live. We have carefully reviewed the district attorney's argument in light of all of the evidence. We do not find that it requires the grant of a mistrial." See also: Ozburn v. State, 87 Ga. 173 (13 S.E. 247); Bailey v. State, 153 Ga. 413 (112 S.E. 453); Johnson v. State, 154 Ga. 529 (114 S.E. 713); Allen v. State, 187 Ga. 178 (200 S.E. 109); Hyde v. State, 196 Ga. 475 (26 S.E. 2d 744); McLendon v. State, 205 Ga. 55 (52 S.E. 2d 294); Patterson v. State, 206 Ga. 260 (56 S.E. 2d 501); Wynn v. State, 207 Ga. 141 (60 S.E. 2d 767); O'Bryant v. State, 222 Ga. 326 (149 S.E. 2d 654). The Petitioner contends that the prosecutor's closing remarks were inflammatory and prejudicial to her during the closing argument of the District Attorney during the guilt phase of the trial. The District Attorney made a reference to the fact that this is a very important case which was hard to deal with because of the nature of the facts of the case. Petitioner also objects to the prosecutor's remarks concerning the victims

that we hope to God that they died instantly. The Petitioner objects to a reference by the District Attorney to the Petitioner as a very scheming person, and further objects to a statement by him that he appreciated the jury's attention in this case, as under the law a person is entitled to a trial and all the corresponding legal rights. Petitioner also objects to the prosecutor's arguments concerning the relationship between John Maree and the Petitioner. From the testimony and evidence presented to this Court, it appears to this Court that these arguments were not improper and not necessarily prejudicial to the jury as a determiner of the facts and the evidence, and if anything were mere flight of oratory concerning reasonable deductions from the evidence. Concerning what the Petitioner terms "emotionally laden" remarks made during the guilt phase of the trial, it appears to this Court that the prosecutor may urge severe punishment and offer plausible reasons for imposing capital punishment. In Chenault v. The State, 234 Ga. 216 (215 S.E. 2d 233), held: "A prosecutor may argue for a death sentence and offer plausible reasons for his position. Allen v. State, 187 Ga. 178, 182 (200 S.E. 109); Strickland v. State, 209 Ga. 675 (2) (75 S.E. 2d 6). The remarks objected to in the motion were not made during the first phase of the trial, that in which the jury was to pass upon the defendant's guilt or innocence, but were made during the sentencing portion of the trial. The district attorney may urge severe punishment. Bailey v. State, 153 Ga. 413 (4) (112 S.E. 453); Hamilton v. State, 131 Ga. App. 69, 70 (205 S.E. 2d 24). Although such statements may have been objectionable if made during the guilt determining stage, protection of the community is one consideration a jury is entitled to entertain in determining an appropriate sentence." Therefore, this Court concludes that these remarks by the District Attorney were in support of the arguments for punishment and, therefore, were permissible during the sentencing phase of the Petitioner's trial. Accordingly,

based on the above Findings of Fact and Conclusions of Law, this Court finds that Petitioner's contentions: (1) Petitioner's Counsel at trial failed to object to or move to strike those parts of the prosecution's closing argument which alleged "facts" not in the record; (2) Petitioner's Counsel at trial failed to object to the prosecution's inflammatory, misleading and prejudicial closing argument, are without merit. Also, this Court finds that the prosecutor's closing argument to the jury during the final phase of the Petitioner's trial were non-prejudicial and non-violative of her Due Process Rights under the United States Constitution.

L. The Petitioner contends that it was improper for the district attorney to comment on the disappearance of Mrs. Machetti's oldest daughter, Vickie Akins, and also that it was improper for the district attorney to refer to the fact that the Petitioner's other two daughters were not called as witnesses for the defense. Petitioner alleges that such remarks were highly prejudicial to her, and represented ineffectiveness of counsel for Petitioner. This contention is without merit.

In Delvers v. State, 139 Ga. App. 119 (227 S.E. 2d 844) (1976), the prosecutor made the following statements: "But where are those witnesses. Think about it. That's a factor. That's a factor in this case. I submit to you that if a person was charged with this offense and he was not guilty he will do everything he could to have somebody to account for where he was, but as of this moment we haven't heard one word...." Id. at 121.

The Georgia Court of Appeals in Delvers, supra, found that there was no error, as the prosecutor's comments were directed to the failure of the defense to present any evidence to rebut proof which the State had presented at trial. Floyd v. State, 135 Ga. App. 217, 220 (217 S.E. 2d 452) (1975), stated the proposition that, "having introduced evidence sufficient to suggest Defendant was the

guilty party, the State's counsel has the right to suggest this proof has not been rebutted." This Court holds that the argument of the district attorney cited by the Petitioner as error fails squarely within this principle as it suggests that evidence which the State has presented has not been rebutted by the defense.

The right to comment in closing argument on the failure of a defendant to call as a witness a person whom the defendant has identified as having favorable testimony is widely recognized in the Federal Courts. See United States v. Grammer, 513 F2d 673 (9th Cir. 1975); United States v. Smith, 520 F2d 554 (8th Cir. 1975); United States v. Strider, 529 F2d 806 (3rd Cir. 1976).

A statement by the prosecution concerning the failure of the defendant to call witnesses, as long as they avoid the pitfall of referring to a defendant's failure to testify, is permissible under both Georgia and Federal law, and, therefore, it is the holding of this Court that this allegation is without merit.

M. Petitioner now claims ineffective assistance of counsel because her trial counsel should have raised an insanity defense in her behalf. Petitioner's attorney testified at the habeas corpus hearing that he did not consider raising insanity defense, because of the fact that he did not think that the Petitioner was crazy any more than he himself was. The fact that the District Attorney testified that he anticipated the possibility of an insanity defense, does not indicate that this defense would have been viable for the Petitioner. Also, Mr. Donald Thompson, an Assistant District Attorney at the time of Petitioner's trial who actively participated in her prosecution, stated concerning the possibility that the insanity defense would be raised, but "also he did not anticipate that it would be raised. If she had been acting alone, I would have thought that would have been a possible defense. But it would be absurd for an attorney to raise the defense

of insanity when three people planned and carried out a murder." It appears to this Court that the defense which Petitioner's attorney formulated on behalf of the Petitioner was more in the form of an alibi defense based on her presence in Florida at the time of the murders, and as Petitioner's attorney believed that, in his own words, "I was convinced at that time that she knew nothing about it. It was all done between the three girls and John Maree." It appears this line of defense was formulated and implemented throughout the trial. An insanity defense would have been in opposite to this line of defense and totally inappropriate, especially in the light of the State's contention that these three people had formed a type of conspiracy to commit these two murders. The Petitioner cites questions which have been contained in the report of the Trial Judge to the Georgia Supreme Court for the purposes of sentence review on the opinion concerning psychiatric evaluations and information. The mere fact that these questions were on the form does not indicate that it would have been appropriate for her to have been psychiatrically evaluated in this case. Therefore, this Court finds, based upon the above mentioned conclusions, that the contention of the Petitioner as to ineffectiveness of counsel for failing to raise an insanity defense for the Petitioner in her trial, is without merit.

N. The next contention raised by the Petitioner under the general heading of ineffective assistance of counsel is that she contends that her trial counsel erred in failing to request a preliminary hearing or filing a Brady Motion, as in Brady v. Maryland, 373 U.S. 83 (83 S.C. 1191. 10 LEd. 2d 215) to obtain evidence from the State which could have assisted her case. Petitioner's attorney had testified that he did not feel a petition for discovery was necessary as he had attended the four-day trial of Petitioner's husband at which the State presented essentially the same evidence as it would present at the Petitioner's trial. Mr. Donald Thompson, who was an Assistant District

Attorney at the time of Petitioner's trial, stated that some items were made available to Petitioner's attorney at his request, such as a list of witnesses, and that he was aware that Petitioner's attorney had attended the entire trial of the Petitioner's husband, and that the evidence was essentially the same at both trials. Mr. Thompson stated to his knowledge there was no evidence in the possession of the State which could have been subject to a Brady motion. Petitioner states that her attorney should have obtained a copy of John Maree's confession of the State prior to her trial, and use that confession to impeach him. However, Petitioner's attorney did not need to obtain a copy of John Maree's confession from the State, as he had obrained the confession in advance of the trial from Mr. Floyd Buford, Anthony Machetti's attorney. Petitioner's attorney utilized this statement for impeachment purposes in cross-examining John Maree at the Petitioner's trial. Therefore, from the testimony and evidence presented to this Court, it appears that any discovery would not have revealed any further evidence which would have been helpful to the Petitioner, and, therefore, the trial counsel's failure to make such a motion does not constitute ineffective assistance of counsel.

O. The Petitioner now contends that it was error of her trial counsel in failing to make a Motion for a Mistrial on the two occasions cited by Petitioner. The two times during the Petitioner's trial which the Petitioner now asserts that her Counsel should ha e moved for mistrial both deal with events involving a juror, when a juror became nauseated, and a second instance in which the Court made certain that a juror who needed medication in the form of allergy shots, had the opportunity to have his medication, as necessary. Petitioner's attorney stated during the habeas corpus hearing that he saw nothing during the trial on which to make a motion for mistrial. It

appears to this Court, the mere fact that Petitioner's present counsel would have made these motions regardless of their possibility of success during the trial, does not form a basis of finding that trial counsel was ineffective in failing to make motions for mistrial at the time of these occurrences. Therefore, from the testimony and evidence presented to this Court, this Court feels that there was not an abuse of Petitioner's attorney's discretion as trial counsel to determine that a Motion for Mistrial was not appropriate in either of these two instances occurring during the trial. See Hawes v. The State, 240 Ga. and Fortson v. State, 240 Ga. 5 (____S.E. 2d ____). 327 (____S.E. 2d ____);/ Therefore, this contention as to ineffectiveness of counsel for failing to make Motions for Mistrial, is without merit.

P. The Petitioner alleges that her Counsel should have objected to her being transferred by Chief Deputy Ray Wilkes from the Bibb County Jail to a Warner Robins institution for 28 days as alleged punishment for her failure to respond to questioning by Chief Deputy Wilkes. Petitioner's attorney testified he did object to the transfer to Warner Robins as soon as he was informed of such a transfer had taken place. Petitioner's attorney stated he called Sheriff Jimmy Bloodworth and complained concerning the transfer of the Petitioner to Warner Robins, and she was returned to the Bibb County Jail on the basis of his complaint. Mrs. Irene Morris stated concerning Petitioner's transfer to Warner Robins that she accompanied the Petitioner during the transfer. She was told that during the transfer that the reasoning behind it was that Petitioner's husband and other co-Defendant in the same case were being brought to the Bibb County Jail, and the authorities were of the opinion that the three co-Defendants should not be confined in the same facility until the investigation was completed. However, the evidence does show that Petitioner's attorney did take action on behalf of the Petitioner in this

matter and succeeded in having the Petitioner returned to the Bibb County Jail. Therefore, this Court concludes this contention of ineffectiveness of counsel in the objecting to Petitioner's transfer from the Bibb County Jail to the Warner Robins Jail, is without merit.

Q. Petitioner cites various miscellaneous actions which she asserts supports her claim of ineffective assistance of counsel. Specifically, she contends: (1) That her Counsel at trial failed to introduce documents and confused dates so that he was prevented from making use of the documents during his final argument, and on direct and cross-examination of the witnesses; (2) That her Counsel at trial failed to present evidence as to Petitioner's good character, lack of criminal record, or other mitigating factors; (3) That her Counsel at trial made other errors which resulted in ineffective representation. Also, the Petitioner cites the failure of her trial counsel to have the jury polled, and further attacks various portions of the Brief which her trial counsel submitted to the Georgia Supreme Court in appealing her conviction. It appears to this Court that Petitioner's trial counsel may not have presented a Brief totally free of certain misstated citations or inadequacies, it is this Court's feeling that the Brief succeeded in presenting substantial issues for review by the Supreme Court of Georgia, and was adequate under the standard of reasonably effective assistance of counsel for this purpose. The issue of whether a particular defendant enjoyed effective assistance of counsel is a question of law. Walker v. Caldwell, 476 F.Ed. 2d 213, (5th Cir. 1973). It appears to this Court the contentions made by the Petitioner in support of this proposition relate to matters of trial tactics and trial strategy as to motions, objections, and cross-examinations. These strategic matters do not form a basis for ineffective assistance of counsel because courts cannot second guess strategic and practical choices made by a trial counsel. United States v. BeCaster, 487

F.Ed. 2d 1197, District of Columbia Circuit, 1973: Pullin v. State, 237 Ga. 759 (229 S.E. 2d 606). In Coco v. United States, ____F.Ed. 2d ____, Case No. 76-3367, March 13, 1978, the Courts cited various cases in its holding that the decisions of defense counsel concerning trial strategy, even if they are made without consultation with their client, bars habeas corpus review of claims which are foregone because of these decisions, except in exceptional circumstances. Therefore, it appears to this Court from the testimony and evidence presented, and based upon the case law mentioned above, those matters which have been previously contended by the Petitioner which related solely to strategical decisions by Petitioner's attorney does not support a finding of ineffective assistance of counsel. Also, those contentions relating to the failure to use evidence allegedly supplied to trial counsel by Petitioner, and the failure to take certain action requested by Petitioner is without merit. It has been held in the case of Williams v. Beto, 354 F.Ed. 2d 698 (5th Cir. 1975), "When one seeks the assistance of counsel, he thereby confesses his own inadequacies in the field and stipulates his willingness, like any other cliant... to be bound by the presumably superior knowledge of the professional man on whose assistance he proposes to depend." Therefore, it appears to this Court by the Petitioner's continued retention of Mr. Hawkins, her attorney, to represent her, both during the trial and appeal, Petitioner at least implicitly stated her confidence in his judgment in her reliance in his judgment in making various decisions involving the conduct of the case. It also appears to this Court that the Petitioner having assented to those actions, she may not now allege them as the basis for ineffective assistance of counsel. Therefore, this Court concludes viewed in the context of all of the time which Mr. Hawkins spent on the Petitioner's case, and all of the action he took in her behalf, which

have previously been discussed, it appears to this Court that applying the legal standards which have been cited to the facts and circumstances of the present case as revealed by the record, it cannot be said that the Petitioner was denied her constitutional right of reasonably effective assistance of counsel.

R. The Petitioner alleges that it was a violation of Due Process, that there had been no evidence presented on her behalf during the sentencing phase of the trial and also ineffective assistance of counsel. No evidence was presented either in aggravation by the State or mitigation by the defense at the Petitioner's trial, although both the District and Petitioner's Counsel made brief closing statements following the guilty verdict of the jury. The District Attorney stated that the State would rely on the evidence presented during the guilt phase of the trial. Petitioner's attorney stated that he did not wish to offer any evidence. He explained during the habeas corpus hearing there was no evidence to present on her behalf, as both he and the District Attorney had offered all the available evidence during the guilt phase of the trial. He further stated that neither the Petitioner nor her mother ever provided him with the names of any character witnesses to be called on Petitioner's behalf. He stated that there were certain persons who Petitioner states could have testified, but when asked to testify, they refused. It appears to this Court that Petitioner's Due Process rights were not violated by having no evidence presented during the guilt phase of the trial, as she was afforded the opportunity to present this evidence in accordance with the principles enunciated in the cases cited by the Petitioner, Gregg v. Georgia, 428 U.S. 153 (1976); and Woodson v. North Carolina, 428 U.S. 280 (1976), and further in accordance with the provisions under Georgia law dealing with pre-sentence hearings in felony cases under

Ga. Code Ann. Section 27-2503. Therefore, this Court concludes there was no Due Process violation, as the proper legal procedures were followed, but there was merely no evidence to be presented at the sentencing phase. It also appears to this Court that ineffective assistance of counsel has not been shown by the fact that no evidence was presented on behalf of the Petitioner during the sentencing phase of the trial. As previously noted, the State presented no aggravating circumstances and, therefore, there was no necessity for the defense to present any evidence contradicting that offered by the State. Also as already noted, Petitioner's attorney stated that he knew of no witnesses available at the time of sentencing to testify on behalf of Petitioner's character. The fact that Petitioner has now produced affidavits from various persons stating that they would have testified on behalf of the Petitioner does not show that these persons came forward at the time of trial and offered to appear as witnesses, nor does it show that the Petitioner provided her attorney with the names of these persons prior to or during her trial, that she states would have been willing to testify. Petitioner makes reference to the James Dickey case, another murder case in which the death penalty was sought in the Superior Court of Bibb County, Georgia. Mr. Hasty, District Attorney at the time of Petitioner's trial, was questioned concerning the similarities between the Dickey case and Petitioner's case during his deposition for use in the habeas corpus hearing. Petitioner argues that in the Dickey case, no death sentence was imposed, based, she asserts, on the fact that Mr. Dickey's mother testified on his behalf during the sentencing phase of the trial. However, Petitioner herself points out a crucial difference in the Petitioner's case and the Dickey case. She states that in the Dickey case, evidence in aggravation was introduced during the sentencing phase; i.e., evidence of a prior criminal record.

Mr. Hasty noted that the factual background of the Dickey case and that of the Petitioner is dissimilar, as aggravating circumstances were introduced in the Dickey case. In the present case before this Court, no aggravating circumstances were offered, instead Mr. Hasty stated that he relied on the evidence which he had presented during the guilt phase of the trial. Therefore, this appears to this Court to be a conscious decision, not an oversight, or inadequate preparation on the part of Mr. Hawkins not to introduce evidence at the sentencing phase, and cannot be said to constitute ineffective assistance of counsel. The fact that another attorney may have taken different actions or made different judgments on behalf of a defendant had he represented a defendant at the trial, does not require a finding that a defendant's representation by trial counsel was so inadequate as to have denied him effective assistance of counsel. Fortson v. State, supra; Pitts v. Glass, 231 Ga. 638 (203 S.E. 2d 515); Johnson v. Caldwell, 228 Ga. 776 (187 S.E. 2d 844).

"Counsel for the accused did engage in a battle for the rights of the accused, and the mere fact that defense counsel failed to make objection to evidence, failed to move for a mistrial, failed to apply some other tactic, or did some things contrary to the judgment of present counsel representing the accused, does not justify applying to him the brand of incompetence." Hart v. State, 227 Ga. 171, 176, 177 (10 (179 S.E. 2d 346).

In conclusion, under the general contention by the Petitioner of ineffective assistance of counsel, this Court has made a fair and exhaustive examination of the record, transcripts and evidence of this case, and this Court can find no case of ineffective assistance of counsel. In Williams v. Beto, 354 F. 2d 698, (5th Cir.) held: "It is the general rule that relief from a final conviction on the ground of incompetence or ineffective counsel will be

granted only when the trial was a farce, or a mockery of justice, or was shocking to the conscience of the reviewing court, or when the purported representation was only perfunctory, in bad faith, a sham, a pretense, or without adequate opportunity for a conference and preparation... Lawyers are not required to be infallible... the ability and faithfulness of an attorney is not to be judged whether he won or lost the verdict." In Odom v. United States, 337 F. 2d 853, the Court observes: "The Constitution, it must be remembered, commands a battle, but not a victory." The record in this case shows that the trial counsel adequately represented the Petitioner.

The test as to inadequacy of representation has also been stated to be "that an attorney must have been 'so ignorant, negligent or unfaithful that the accused was virtually unrepresented or did not in any real or substantial sense have the aid of counsel.'" Givens v. Dutton, 222 Ga. 756 (152 S.E. 2d 358) (1966); Veasley v. State, 142 Ga. App. 863 (237 S.E. 2d 464) (1977); Gardner v. State, 117 Ga. App. 262 (160 S.E. 2d 271) (1968). When the trial transcript is viewed in its entirety, the allegations of the Petitioner do not establish such negligence as to show that Petitioner was virtually unrepresented during her trial. It does not appear to this Court that his representation of the Petitioner was merely perfunctory, a sham, a pretense, or in bad faith. Nor was the trial in any sense a farce or a mockery of justice. Petitioner's counsel did engage in a battle for the rights of the Petitioner, and the mere fact that the Petitioner's Counsel failed to make objection to evidence, failed to move for mistrial, failed to apply some other tactics, or did something contrary to the judgment of the present counsel representing the accused, does not justify applying him the brand of incompetence.

"This Court does not determine whether a defendant has been denied effective assistance of counsel

based upon whether the defendant is convicted or receives the death sentence; rather, the issue is as to how the case was handled by counsel. Brown v. Ricketts, 233 Ga. 809 (213 S.E. 2d 672) (1975). Effectiveness is not measured by hindsight (Pitts v. Glass, 231 Ga. 838 (203 S.E. 2d 515) (1974)), or by how another lawyer might have handled the case. Estes v. Perkins, 225 Ga. 268 (1) (167 S.E. 2d 588) (1968)." Goodwin v. Hopper, 243 Ga. 193 (____S.E. 2d ____).

The standard now utilized for determining the effective assistance of counsel, was adopted by the Georgia Supreme Court in Pitts v. Glass, supra, of "counsel reasonably likely to render and rendering reasonably effective assistance." The Fifth Circuit Court of Appeals in MacKenna v. Ellis, 286 F. 2d 592, 599 (5th Cir. 1970), interpreted this standard more fully to mean "not errorless counsel and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." See also Loftis v. Estelle, 515 F. 2d 872 (5th Cir. 1975); Burston v. Caldwell, 506 F. 2d 24 (5th Cir. 1975); West v. Louisiana, 478 F. 2d 1026 (5th Cir. 1973).

Georgia Courts have used similar language in interpreting the constitutional right to assistance of counsel by stating this right "does not guarantee errorless counsel, nor counsel judged ineffective by hindsight." Jones v. State, 232 Ga. 771 (1974); see also Hawes v. State, 231 Ga. 638, 639 (1974); Fortson v. State, supra. Petitioner asserts in her brief that a court may only judge the effectiveness of counsel by hindsight, but she neglects to note that although of necessity the Court must look back in making a decision on effectiveness and must make this decision based on the situation as it existed at the time the representation was made, not on what the Court can determine at this point might have been a better defense

or prevented conviction.

In Brown v. Ricketts, supra, the Supreme Court of Georgia stated that it was not whether a conviction was entered by which the effectiveness should be measured, but rather it should be measured by how the litigation was handled. In this case, ineffectiveness of counsel should not be found on the basis that Petitioner was convicted and received the death penalty, but rather may only be found by the court if there is a determination that Petitioner's counsel failed to meet the standard of rendering reasonably effective assistance. The court in Pitts v. Glass, supra, stated: "This does not mean, however, that an accused who is dissatisfied with the outcome of the trial or appeal can subsequently free himself from the demands of justice by determining on account thereof that his counsel must have been ineffective because he was convicted, on the contrary, the effectiveness of counsel cannot fairly be measured by the results of a criminal trial on appeal, but upon the reasonable effectiveness of counsel at the time the services were rendered."

Additionally, the standard for effective assistance of counsel under the Sixth Amendment right to counsel, has often been viewed in a different light when the counsel is retained. This is especially true in federal courts. In Fitzgerald v. Estelle, 505 F. 2d 1334, 1337 (5th Cir. 1975) (Enbanc), the court held that to establish a denial of the Sixth Amendment right to counsel where it was retained counsel, there was a requirement that there either be a showing that (1) retained counsel performed so poorly as to render the proceedings unfair or (2) that retained counsel's conduct fall short of reasonably effective assistance and some reasonable government official connected with the criminal proceeding who could have remedied the conduct failed in his duty to accord justice to the accused. See also United States v. Childs, ____F. 2d ____, No. 77-5571, 5th Cir. 1978.

On some occasions Georgia courts have distinguished between retained and appointed counsel in such cases as Thornton v. Ault, 233 Ga. 172, 174 (1974), and Hopkins v. Hopper, 234 Ga. 236, 238 (1975), and in certain instances, such as those dealing with the right to appeal, have recognized no difference. Kreps v. Gray, 234 Ga. 745 (1975), and Bell v. Hopper, 237 Ga. 810 (1976). It is the Respondent's contention that although Petitioner's counsel must be held to the standard of reasonably effective assistance, his continued retention by the Petitioner should be a considerable factor in the court's determination of whether or not he met this standard.

It is so very easy for one lawyer to unreasonably criticize another lawyer in review of a case that has already been tried. The Courts are asked to judge cases, and conduct of lawyers in cases, with too exacting a measure or legal yardstick. Doctors are not expected to be able to perform miracles and guarantee healing or recovery, instead of death, regardless of the particular illness, and theirs is only a standard of professional conduct as practiced by members of the medical profession. Accordingly, lawyers should not be held to guarantee an acquittal, regardless of the facts of the offense with which a person is charged where the determination of the facts, application of law given in charge to the facts as found and recommendation of the death penalty is left to a jury for determination. Although death penalty cases are different, in degree and kind, from all other cases, it should not be a matter for the reviewing Courts to try the lawyers representing the death penalty defendants, or for the Court to be required to advise in any way how a trial should have in fact been handled unless it be according to some clearcut legal premise and legal reasons should not be sought just to justify affirming the critics point of view of how one lawyer did not do what the latter thinks the former should have done.

The mere fact that counsel did not take the advice of his client totally and completely untrained in the law, should not present then a foregone conclusion that the client was right and the lawyer wrong. To do such is to give no credit to the professional integrity and educational training which the counsel has obtained in his pursuit of the legal profession. Who is so authoritative as to say that the majority of lawyers are or are not competent. No one judge or lawyer knows all that is to be known so as to authorize him the right to make such a blistering indictment that does not single out the few who are incompetent, but damages the large majority who are well-trained and extremely competent. If all of the integrity and decision-making ability of counsel, in addition to his legal education and his practical courtroom experience is to be disregarded the conclusion may well be reached that there is no need for any lawyers.

II.

The next issue raised by the Petitioner in the nature of a writ of habeas corpus is that Petitioner's rights under the Fifth and Sixth Amendments and the Due Process Clause of the 14th Amendment to the Constitution of the United States, and Art. I, Sec. I, Paragraph I, IX, XI, and XIII, of the Constitution of the State of Georgia was violated by the prosecution's use of a post-arrest silence against her. The Petitioner contends that she testified at trial as to facts she had never told investigating authorities because she had never been asked, and the prosecution used that part of her testimony to imply that the facts were a tardy fabrication to conceal her own guilt. The Petitioner further contends that the prosecution at trial argued that Petitioner's failure to shed tears, either before or during the trial, was evidence of her guilt. The Petitioner has previously raised this contention in her petition for a writ of certiorari to the

Supreme Court of Georgia in 1976. In that petition, Petitioner based her claim of an improper use of post-arrest silence on the contention that the testimony utilized at her trial was of the type specifically prohibited in Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 48 L. Ed 2d 91 (1976). It appears to this Court that a discussion of the Doyle case would be helpful at this point. In the Doyle case, during the course of the State criminal trial, the Petitioners, who were arrested were given warnings in line with Miranda v. Arizona, 384 U. S. 436, 86 S.Ct. 1602, 16 L. Ed 2d 694, took the stand and gave an exculpatory story that they had not previously told the police or the prosecutor. Over their counsel's objection they were cross-examined as to why they were not given the arresting officer the exculpatory explanation at the time of their arrest. The Petitioners were convicted, and their convictions were upheld on appeal. However, when the case was taken up by the United States Supreme Court, the United States Supreme Court held the use of impeachment purposes of Petitioner's silence at the time of arrest and after they received Miranda warnings, violated the Due Process Clause of the 14th Amendment. Post-arrest silence following such warnings was insolubly ambiguous; however, it would be imminently unfair to allow an arrestee's silence to be used to impeach an explanation subsequently given at trial, after he had been impliedly assured by the Miranda warnings, that silence would carry no penalty. See: Michigan v. Tucker, 417 U.S. 443, 94 S.Ct. 2357, 41 L. Ed. 2d 182; United States v. Hale, 422 U.S. 171, 95 S.Ct. 2133, 45 L. Ed. 2d 99. It appears to this Court that Doyle v. Ohio, supra, is an attempt by the United States Supreme Court to deal with those situations in which a prosecutor attempts to impeach a defendant by cross-examining him as to his post-arrest silence after receiving the Miranda warnings required by Miranda v. Arizona, supra. However, it appears to this Court that anything which Petitioner stated, or failed to state, during her

interviews with the police, is not subject to the requirements of Miranda v. Arizona, supra, or other cases interpreting the rights guaranteed by the Miranda decision. The reason that Miranda is inapplicable to Petitioner's case, is that in order for those rights to be invoked, there is a requirement that the defendant be in custody during an interview with the police. The evidence in this case shows that the Petitioner was not in custody at the various times she was interviewed by the police, and, therefore, could not invoke the Constitutional right to remain silent in the face of police interrogation. The Supreme Court of Georgia in its decision in the Petitioner's case, although not addressing this issue directly, found in connection with another issue that Petitioner's interview with the police could not be deemed to be within the parameters of the custodial interrogation under the four criteria outlined in Brown v. Beto, 468 F. 2d 1284, 5th Cir. 1972. The Supreme Court of Georgia stated in the Petitioner's case in Smith v. State, 236 Ga. 12 (222 S.E. 2d 308): "The case of Miranda v. Arizona contemplated an 'in custody' interrogation. Miranda v. Arizona, supra; Wilburn v. State, 230 Ga. 675, 679 (198 S.E. 2d 857) (1973); Kemp v. State, 227 Ga. 251, 252 (179 S.E. 2d 920) (1971). The evidence in connection with the interviews in this case is outside the parameters of 'custodial interrogation' delineated by the four criteria spelled out in Brown v. Beto, 468 F. 2d 1284, 1286 (5th Cir. 1972) in that at the time of the interviews: (1) the police did not have probable cause to arrest; (2) the subjective intent of police was to locate possible persons involved; (3) the appellants did not appear to believe themselves to be in custody and subjected to interrogation, and (4) the investigation had not at that time focused on the appellants as someone the state planned to indict." It appears to this Court that based on the finding of the Supreme Court of Georgia, Petitioner may not now claim there was a custodial interro-

gation which would make Doyle v. Ohio, supra, applicable to her case and use it as a basis for this contention in her habeas corpus action. Doyle v. Ohio dealt with silence in the wake of Miranda warnings, which silence was interpreted as an arrester's exercise of their Miranda rights. However, as previously stated, the silence of the Petitioner or her failure to disclose certain exculpatory evidence during the police interviews was not while she was in custody, nor in the wake of being given her Miranda warnings, but instead occurred prior to the necessity of any warnings being given. As to the testimony presented relating to the Petitioner's failure to shed tears, it appears to this Court that this, too, is not the use of post-arrest silence prohibited under the holding in Doyle v. Ohio, supra. This was not silence, or failure to shed tears in a situation of custodial interrogation and in the wake of Miranda warnings. Therefore, this Court concludes the use of this testimony was not violative of Doyle v. Ohio, supra.

Therefore, the contention of Petitioner that her rights were violated by the prosecution's use of a post-arrest silence against her is without merit.

III.

The Petitioner now contends her rights under the Fourth and Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and Art. I, Sec. I, Paragraphs I, IX, XI and XIII of the Constitution of the State of Georgia were violated because she was suffering from the effect of personality-altering drugs administered to her before and during the trial. The Petitioner contends that she was given drugs while she was incarcerated, before and during her trial, which prevented her from thinking clearly and making normal responses to questions while she testified, thereby misleading the jurors as to her true character and personality. Petitioner states that she was administered a drug on each

day of the trial on the authorization of her attorney, without her consent, with the result that she acted, in her own words, "like a robot" throughout the trial. At her habeas corpus hearing the Petitioner testified that Mrs. Irene Morris, the head matron at the Bibb County Jail, administered this medication to her. The Petitioner contends that she was given medication by Mrs. Morris on Monday, Thesday, and Wednesday mornings, and that on Thursday and Friday medication was administered to her by means of a syringe. She further testified that based on her medical knowledge as a nurse, she identified this medication as "Thorazene", a medication she described as a "rather strong tranquilizer and depressant". Mrs. Morris testified in direct conflict to the testimony of Petitioner. Mrs. Morris testified that in her capacity as head matron, she was in a position to oversee the medication given to the Petitioner, and that a record was kept in the regular course of business of the jail of the medications administered to each prisoner. Mrs. Morris testified that a daily log was kept of each individual inmate in the women's division which included the date, time of day, and type of medication administered to each female inmate. Mrs. Morris also testified that she had in her custody the records of medication for the Petitioner covering the days during which the Petitioner was on trial in Bibb County Superior Court, from February 24, 1975, to March 1, 1975. A copy of these records was introduced into evidence. The records failed to show any medication being given the Petitioner on any of the dates which she alleged she was given such medication in her testimony at the habeas corpus hearing, Monday through Thursday, February 24 through March 1, 1975. The record does show that Petitioner was not given any medication other aspirin, during these dates, except two tranquilizers following her receiving her death sentence, and that Mrs. Morris, as well as all the matrons were directly

ordered by Chief Deputy Wilkes to administer only medication authorized by prescription, administered in the presence of the matron. The testimony of Mrs. Joyce Williams, the bailiff on duty during the Petitioner's trial, eliminates the possibility that any medication could have been given to the Petitioner while she was actually present in the courtroom. At the habeas corpus hearing, the Petitioner testified that Mrs. Morris told her that her attorney had authorized the medication for her. However, Mrs. Morris made no mention of any request for medication made by Petitioner's attorney on behalf of his client. Petitioner's attorney on direct examination flatly denied requesting any medication for Petitioner, and further denied that he even had the authority to have her given any medication. He also stated that to his knowledge, the Petitioner was under no medication during her trial and, in fact, appeared perfectly calm. Therefore, from the testimony and evidence given to this Court, it appears that the Petitioner was given no unauthorized personality-altering drugs. The burden not having been carried by the Petitioner, the contention of the Petitioner as to violation of her constitutional rights by the use of unauthorized personality-altering drugs is without merit.

IV.

The Petitioner now contends that her rights under the Due Process Clause of the Fourteenth Amendment and the Sixth Amendment to the Constitution of the United States, and Art. I, Sec. I, Paragraphs I and XI of the Constitution of the State of Georgia were violated because of the indictment charging the Petitioner contained no notice of aggravating circumstances, thereby depriving Petitioner of an opportunity to be heard and to assist her counsel in the preparation of her defense, and to have the grand jury pass upon elements of aggravation. The Petitioner states: (1) The prosecution in this case alleged four aggravating circumstances to justify the imposition of the death penalty; (2) The

Defendant was not advised in the indictment that aggravating circumstances were being charged or that proof would be offered thereon; (3) The Defendant learned of the intent of the State to offer evidence on the question of aggravating circumstances at so late an hour prior to trial as to prohibit adequate response thereto, or to allow preparation of rebuttal thereto; (4) The grand jury did not consider and screen every factual allegation of the prosecution which was subsequently to be used at trial as the basis for Petitioner's conviction of a grade of offense which subjected her to the death penalty.

Prior to the enactment of the present death penalty law in this State a specific provision had been enacted to deal with, and set procedure for, "Pre-sentence hearing in felony cases", the same being Ga. Ann. Code Sect. 27-2534 (Ga. L. 1970, pp. 949, 950; 1971, p. 902), which reads in pertinent part as follows: "At the conclusion of all felony cases and after argument of counsel and proper charge from the Court, the jury shall retire to consider a verdict of guilty or not guilty without any consideration of punishment. Where the jury returns a verdict of guilty, the Court shall resume the trial and conduct a pre-sentence hearing before the jury at which time they only issue shall be the determination of punishment to be imposed. In such hearing, subject to the laws of evidence, the jury shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any such prior criminal convictions and pleas: Provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The jury shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the

punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument to the jury. Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions and the jury shall retire to determine the punishment to be imposed. The jury shall fix a sentence within the limits prescribed by law. The judge shall impose the sentence fixed by the jury as provided by law. ..." (Emphasis supplied.). As a part of the death penalty law Ga. Ann. Code Sect. 27-2534.1 Mitigating and aggravating circumstances; death penalty (Ga. L. 1973, pp. 159, 163) (which is a part of the present death penalty law in Georgia) provides in pertinent part as follows: "...(b) In all cases of other offenses for which the death penalty may be authorized", (other than aircraft hijacking or treason in the preceding sub-section (a)) "the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence: (then are listed ten (10) specific statutory aggravating circumstances).

"...(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. ... Except in case of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in section 27-2534.1 (b) is so found, the death penalty shall not be imposed." (Emphasis supplied.).

There is no provision for the statutory aggravating circumstances, relied upon by the State, to be included in the wording of the indictment itself or to be

specifically presented to the grand jury for any finding or special consideration. In many, if not all, of the statutory aggravating circumstances, it is difficult, if not impossible to say, that evidence is not presented the grand jury at the time that the matter is presented (Example: where it is contended that the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim".). The safeguards are several: (1) the statutory aggravating circumstance relied on by the State must be "made known to the defendant prior to his trial" or otherwise it is not admissible for consideration; (2) the judge shall consider and include in his instructions any "statutory aggravating circumstances which may be supported by the evidence"; (3) "the statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation"; and (4) "unless at least one of the statutory aggravating circumstances enumerated in section 27-2534.1 (b) is so found, the death peralty shall not be imposed." A defendant is also allowed to introduce and argue any matters and circumstances of "extenuation and mitigation". The Supreme Court of Georgia in the automatic and mandatory review that is required must determine that the jury in its finding of a statutory aggravating circumstance has done so without any influence of passion, prejudice or any other arbitrary factor, (Ga. Ann. Code Sect. 27-2537 (c) (1).) and the burden is on the State and any statutory aggravating circumstance is to be and must be found to a moral and reasonable certainty and beyond a reasonable doubt.

In Gregg v. Georgia, 428 U.S. 153 (96 Sup. Ct. 2909, 49 L.Ed 2d 859) it was held that Georgia's new sentencing procedures prevent penalty of death from being imposed in arbitrary or capricious manner in that as a prerequisite to imposition of death penalty, the jury must make specific findings as to circumstances of crime or character of the defendant and the statutory scheme also

provi[redacted] for automatic appeal of all deat[redacted]entences to the Supreme Court of Georgia to ensure that a sentence of death in a particular case is not disproportionate. And this statute has been held to be constitutional in Coley v. State, 231 Ga. 829, 835 (204 S.E. 2d 612); House v. State, 232 Ga. 140, 145 (205 S.E. 2d 217); Eberhart v. State, 232 Ga. 247, 250 (206 S.E. 2d 12); Floyd v. State, 233 Ga. 280 (210 S.E. 2d 810); Ross v. State, 233 Ga. 361 (211 S.E. 2d 356); McCorquodale v. State, 233 Ga. 369 (211 S.E. 2d 577); and Mitchell v. State, 234 Ga. 160 (214 S.E. 2d 900).

In the case of Hubbard v. The State, 129 Ga. App. 792 (201 S.E. 2d 479) held: "Former defects as to the indictment must be reached by motion to quash, or demurrer in writing, before pleading to merits. Gilmore v. State, 118 Ga. 299 (1) (45 S.E. 226). After verdict it is too late to object to formal defects. Lampkin v. State, 87 Ga. 516, 524 (13 S.E. 523). Issues now raised for the first time come toto late." Also, it appears to this Court that when an individual as Petitioner is indicted for murder by a grand jury, it would appear that she would have known of the possibility of her receiving the death penalty upon a proper conviction by a jury, and of the nature of the offense charged so that the statutory aggravating circumstances would have been obvious. If it was contended that aggravating circumstances were not made known to Petitioner and therefore was a surprise, no effort was made for a continuance, even though it seems unlikely that it would be proper ground for a continuance since the law does not provide any length of time that the same is to be done. No objection having been made it seems the right to object could have been and in fact /was waived and abandoned. Generally defense of the capital offense charged in the bill of indictment would cover any response to facts that would go to make out the statutory aggravating circumstances and any defense of justification, extenuation or mitigation. Other aggravating evidence, including prior convictions, pleas of guilty or pleas of nolo contendere, if any, certainly would have been known to Petitioner as defendant in the original trial. The

contention of Petitioner, as to violation of her rights, due to her having no notice of aggravating circumstances to afford her an opportunity to be heard and to assist her counsel in the preparation of her defense is without merit.

V.

The next issue raised by the Petitioner is that her rights under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, and Art. I, Sec. I, Paragraph I of the Constitution of the State of Georgia were violated because the prosecutor made improper references to the death penalty in his closing arguments during the sentencing phase of the trial. The discussion in this order previously made on sub-section K. of Paragraph I. at pages through seem equally applicable here as to this particular point. The Petitioner alleges: (1) The prosecutor referred to disagreement as to the propriety of capital punishment; (2) The prosecutor specifically asked for two consecutive, rather than concurrent, death sentences and left the clear impression that the Petitioner might someday get her sentences commuted and should be imprisoned for the maximum possible time. The Petitioner has previously raised this issue only in connection with other issues raised in a second petition for certiorari to the Supreme Court of the United States, in which she appealed the denial of her request for a new pre-sentence hearing. Petitioner argues that the District Attorney's closing argument encouraged the diminished consequence to their verdict, by expressing his doubt that any death sentence imposed on the Petitioner would ultimately be carried out. The portions of trial transcript cited by the Petitioner in support of this allegation do not in the opinion of this Court express such a doubt as to the actual carrying out of the death sentences so as to have the prejudicial effect alleged by the Petitioner.

Petitioner cites Prevatte v. The State, 233 Ga. 929 (214 S.E. 2d 365) in support of her proposition. In Prevatte v. The State, supra, the District Attorney during the pre-sentence portion of the trial addressed the trial court in the presence of the jury that, "there is now an automatic appeal which provides that the case go to the Supreme Court of Georgia, where they consider not only the evidence of guilt, but whether or not the evidence in that case warrants the death sentence, they, of their own accord, from reading the record have the right and they have already done so in one particular case, to set aside the death sentence and set a life sentence for the offense of murder." It is clear to this Court that the statements made by the District Attorney in the Petitioner's case are distinguishable from the case cited by the Petitioner. The District Attorney merely stated that the state of law provided that the punishment for murder could either be death or life imprisonment and that the jury makes the recommendation to the Court concerning punishment. The District Attorney went on to refer to the recent arguments concerning the validity of the death penalty and whether or not it was a deterrent to crime. The District Attorney further stated that the Legislature had determined that the death penalty was justified in 1973, and he felt that the state of facts in Petitioner's case were such as to justify the death penalty. Although the District Attorney did refer in the remarks cited by the Petitioner to the fact that he requested the jury to return consecutive death sentences, the District Attorney specifically avoided explaining to the jury any reasons which he might have for asking for consecutive death sentences. He did not make an argument to the jury in the same manner as made in Prevatte case, that the Supreme Court of Georgia on an automatic appeal would determine whether or not the death sentence was warranted. The District Attorney never at any time in the presence of

the jury indicated to them that he felt the death penalty would not be carried out or that the death penalty law might be overturned on appeal. The District Attorney did testify by way of deposition at the habeas corpus hearing that he did not know what the Supreme Court would do concerning the death penalty law, he did not express this in his argument to the jury. In Prevatte v. The State, supra, the Supreme Court of Georgia stated: "Generally speaking, though it is the function of the prosecutor to prosecute and to perform his role as advocate, 'the prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, ... by making predictions of the consequences of the jury's vereict.' American Bar Association Standards for Criminal Justice, 5.8 (d). We find a violation of this precept in the instant case, in that the inevitable effect of the prosecutor's remarks to the Judge in the jury's presence was to encourage the jury to attach diminished consequence to their verdict, and to take less than full responsibility to their awesome task of returning life or death to the prisoners before them.

In Hammond v. State, 156 Ga. 880, 883 (120 S.E. 539), this court considered the following statement made by the prosecutor to the jury: 'If the State has not made out a case, and they convict this man and the evidence does not authorize it, nobody will set it aside quicker than the judge, and if refused may be appealed to the Supreme Court. If he should be turned loose, it was at an end.' This court wrote, 'We are of the opinion that argument of this kind should not have been employed. It tended to lessen the sense of the peculiar and sole responsibility resting on the jury. ... The suggestion that if they should convict him, and the evidence did not authorize it, the judge would set it aside, should not have been made. ...' Three Justices of the court were of the opinion that this statement was prejudicial and required a new trial. The other three Justices also

disapproved the statement but did not consider whether it required a new trial since the same had been granted upon other grounds. Much earlier, in 1848, considering a similar problem posed by remarks of a trial judge, Justice Lumpkin wrote: 'We think, too, that the remark which fell from the court, reminding the jury of the existence of an appellate tribunal, to which the case with which they were then charged might be carried up, if the evidence offered by the prisoner had been wrongfully withheld -- however well intentioned, was calculated, nevertheless, to lessen their sense of their own responsibility....' Monroe v. State, 5 Ga. 85, 139 Cf. Cash v. State, 231 Ga. 285 (201 S.E. 2d 625)." However, this Court has made a thorough examination of Mr. Hasty's, the District Attorney's remarks, and comes to the conclusion that they are not in the category of those remarks in the cases prohibited under the ABA Standards for Criminal Justice, and Prevatte v. The State, 233 Ga. 929 (214 S.E. 2d 365). The mere fact that the District Attorney mentioned differing arguments over the death penalty does not show that he created such prejudice in the minds of the jury that they would "attach diminished consequences to their verdict". This contention of the Petitioner is without merit.

The Petitioner now contends that the prosecutor in error read an excerpt from Eberhart v. State, 47 Ga. 598, to the jury, and attributed it to the Supreme Court of Georgia, thereby denying the Petitioner due process of the Fourteenth Amendment to the Constitution of the United States and Art. I, Sec. I, Paragraph I of the Constitution of the State of Georgia. It appears to this Court that the prosecuting attorney, Mr. Hasty, referred to the case of Eberhart v. State, supra, in his argument during the penalty phase, and read a portion of this case to the jury. However, in Jackson v. State, 219 Ga. 819 (136 S.E. 2d 375), the Solicitor General read from a

decisions of the Supreme Court of Georgia concerning imputing intent to co-conspirators. The Court in Jackson v. State, supra, held that: "It was perfectly proper for the Solicitor General to read that statement to the court in the presence of the jury as it was a correct statement of the law applicable to the facts in this case." In Hall v. State, 241 Ga. 252 (____S.E. 2d ____), the appellant claimed that the District Attorney committed error in reading law to the jury. The Supreme Court of Georgia held that it was clear that the prosecutor was discussing the case with the court, although in the jury's presence. The Supreme Court of Georgia held: "It is not improper for the State to call the court's attention to an applicable principle of law by reference to a case even where the jury is present." It further stated that Ga. Code Ann. Section 24-3319 was inapplicable to this type of situation. The same rationale applies to the facts in the case before this Court in which the District Attorney specifically addressed the Court and stated that it wished to read to the Court from the case of Eberhart v. State, supra. It is obvious that the District Attorney here, as in Hall v. State, supra, was discussing the case with the Court in the jury's presence. As in the case of Hall, supra, it appears to this Court this was not prejudicial and does not violate Ga. Code Ann. Section 24-3319. The contention of the Petitioner is without merit.

The Petitioner now alleges that it was improper for the District Attorney to comment on the disappearance of Petitioner's oldest daughter, Vickie Akins, and also that it was improper for the District Attorney to refer to the fact that Petitioner's other two daughters were not called as witnesses for the defense. The Petitioner alleges that these remarks were highly prejudicial to her. In Delvers v. State, 139 Ga. App. 119 (227 S.E. 2d 844) held: "The defense offered no evidence during the trial of the case, and the defendant elected not to testify before the jury. During final argument, the prosecutor

made the following statement: 'But where are those witnesses. Think about it. That's a factor. That's a factor in this case. I submit to you that if a person was charged with this offense and he was not guilty he would do everything he could to have somebody to account for where he was, but as of this moment we haven't heard one word. ...' Defense counsel objected to this statement as a comment on the failure of the defendant to testify and moved for a mistrial. The court overruled the motion. Appellant urges error in the court's failure to grant a mistrial.

'In the trial of a criminal case in which the accused fails to give sworn testimony or to make an unsworn statement, it is improper for State's counsel to argue that fact to the jury.' Mitchell v. State, 226 Ga. 450, 455 (175 S.E. 2d 545). However, in this case, the prosecutor's comments were directed at the failure of the defense to present any evidence to rebut that proof presented by the state. Having introduced evidence sufficient to suggest defendant was the guilty party, the state's counsel has the right to suggest this proof has not been rebutted. Floyd v. State, 135 Ga. App. 217, 220 (217 S.E. 2d 452). Since the district attorney's comments made no direct references to the failure of the defendant to testify, he was not prohibited from making these comments concerning the evidence in the case, and the trial judge properly denied the motion for mistrial. See Mitchell v. State, 226 Ga. 450 (4), supra."

The right to comment in closing argument on the failure of a defendant to call as a witness a person whom the defendant has identified as having favorable testimony is recognized in the federal courts in United States v. Grammer, 513 F. 2d 673 (9th Cir. 1975); United States v. Smith, 520 F. 2d 554 (8th Cir. 1975); and United States v. Strider, 529 F. 2d 806 (4th Cir. 1976). Therefore, it

appears to this Court that a statement by the prosecution concerning the failure of the defendant to call witnesses is permissible, both under Georgia and federal law, as long as they avoid the pitfall of referring to defendant's failure to testify. From the evidence and testimony presented to this Court, that appears what happened in this case. The contention of the Petitioner as to Prosecutor making improper references to the death penalty in his closing argument in the sentencing phase of the trial being violation of Petitioner's rights, is without merit.

VI.

The next issue raised by the Petitioner is the imposition of Petitioner's death sentences under Georgia law in practice violates the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States, and Art. I, Sec. I, Paragraphs I, XI, XIII, AND XIV of the Constitution of the State of Georgia. The Petitioner contends: (1) The death sentence is cruel and unusual punishment for a person, such as Petitioner, who was not even present at the scene of the crime, but who was in another state when the murders were committed; (2) Because the death sentences were imposed at a time when the constitutionality of capital punishment was unclear, there is every likelihood that at least some of the sentencing jury believed that Petitioner would never actually be executed; (3) The death penalty is in fact administered and applied arbitrarily, capriciously, and whimsically in the State of Georgia; and Petitioner was sentenced to die, and will be executed, pursuant to a pattern and practice of wholly arbitrary and capricious infliction of that penalty; (4) The theoretical justification for capital punishment are groundless and irrational in fact; and death is thus an excessive penalty which fails factually to serve any rational and legitimate social interests that can justify its unique harshness; (5) Actual infliction of the death penalty in general and in

cases like Petitioner's in particular has in fact been repudiated by contemporary standards of decency and dignity; (6) The means by which the death sentence in this case are to be administered, to-wit, electrocution, will inflict wanton and unnecessary torture and torment upon her; (7) Petitioner's death is being exacted pursuant to a pattern and practice of Georgia prosecuting authorities, courts, juries and Governors to discriminate on grounds of poverty in the administration of capital punishment; (8) The Georgia statutory provisions and practices governing appellate review of death sentences; (a) deny Petitioner's effective assistance of counsel; (b) deny Petitioner a fundamentally fair hearing on the issue of life and death; (c) deny Petitioner the effective assistance of counsel and the tools of an adequate defense and appeal because of her indigency. Of these contentions this Court will look into the contention of the Petitioner that because the death sentences were imposed at a time the constitutionality of capital punishment was unclear, and there is every likelihood that at least some of the sentencing jury believed that Petitioner would never actually be executed. What the Petitioner is contending is known as the "Private Slovik Syndrome". For issue of the "Private Slovik Syndrome", the Supreme Court of Georgia held in House v. Stynchcombe, et al., 239 Ga. 222 (236 S.E. 2d 353), "Appellant contends his death sentences should be set aside because they were the first imposed in Georgia under the 1973 capital punishment statute (Ga. L. 1973, Section 7, p. 170; Code Ann. Section 26-3102). He states the jury was 'necessarily' uncertain whether these sentences would ever be carried out. He terms this uncertainty the 'Private Slovik Syndrome' arguing it was 'quite likely' appellant's trial jury 'may' have sentenced him believing the sentence of death would never be carried out.

As to the sentence of death itself, the Georgia death penalty (Ga. L. 1973, pp. 159-172 (Code Ann. Sect. 27-2534.1 et seq.).), enacted subsequent to Furman v. Georgia, 408 U.S. 238 (92 SC 2726, 22 LE2d 346) which had declared the then existing death penalty statute unconstitutional, has been consistently and repeatedly held to be constitutional. Se: Coley v. State, 231 Ga. 829, 835 (204 S.E. 2d 612); House v. State, 232 Ga. 140, 145 (204 S.E. 2d 217); Eberhart v. State, 232 Ga. 247, 250 (206 S.E. 2d 12); Gregg v. State, 233 Ga. 117 (210 S.E. 2d 659); Gregg v. Georgia, 428 U.S. 153 (96 SC 2909, 49 LE2d 859); Hooks v. State, 233 Ga. 149 (210 S.E. 2d 668); Floyd v. State, 233 Ga. 280, 284 (210 S.E. 2d 810); Ross v. State, 233 Ga. 361 (211 S.E. 2d 356); McCorquodale v. State, 233 Ga. 369, 377 (211 S.E. 2d 356); Moore v. State, 233 Ga. 861, 862 (213 S.E. 2d 829); Prevatte v. State, 233 Ga. 929 (214 S.E. 2d 365); Mitchell v. State, 234 Ga. 160 (214 S.E. 2d 900); Jarrell v. State, 234 Ga. 410, 423 (216 S.E. 2d 258); Coker v. State, 234 Ga. 555, 558 (216 S.E. 2d 782); Smith v. State, 236 Ga. 12, 22 (222 S.E. 2d 308); Mason v. State, 236 Ga. 46, 50 (222 S.E. 2d 339); Coleman v. State, 237 Ga. 84, 94 (226 S.E. 2d 911); Isaacs v. State, 237 Ga. 105 (226 S.E. 2d 922); Dungee v. State, 237 Ga. 218 (227 S.E. 2d 746), with a dissenting opinion by Justice Gunter, it being the same as his separate opinion in Coley v. State, supra; Stephens v. State, 237 Ga. 259, 260 (227 S.E. 2d 261); Street v. State, 237 Ga. 307, at page 315 and also dissenting opinion, at page 320, of Justice Gunter and Justice Hill, at page 330 (227 S.E. 2d 380); Duhart v. State, 237 Ga. 426, with dissenting opinion of Justice Gunter, at pages 428-437 (228 S.E. 2d 822[2]); Miller v. State, 237 Ga. 557, with dissenting opinion, at page 560 (229 S.E. 2d 376); Harris v. State, 237 Ga. 718, at page 729 (230 S.E. 2d 1); Hill v. State, 237 Ga. 794, at page 801, with dissenting and concurring opinion of Justice Ingram, at page 804 (229 S.E. 2d 737); and

Young v. State, 237 Ga. 852, 856 (230 S.E. 2d 287[2]);

and Willis v. State, 243 Ga. 185, 190 (10) (___S.E. 2d___);
Collins v. State, 243 Ga. 291 (2), 294 (___S.E. 2d___);
and Godfrey v. State, 243 Ga. 302 (11), 308 (___S.E. 2d ___).

Petitioner's remaining contentions about the death penalty as applied in her case have been resolved adversely to her by the Georgia Supreme Court and by the United States Supreme Court. Petitioner has shown no change in the facts or the law which would cause this Court to recomsider the previously rejected arguments. Accordingly, the Court finds no merit in any of Petitioner's contentions concerning the death penalty.

There is no legal basis for asserting the contentions of appellant during this State's existing post-conviction relief procedures. Appellant should have resolved such contentions upon proper request during voir dire. The time for selecting a fair and impartial jury is upon voir dire. United States v. Farries, 328 F. Supp. 1034 (3) (DC Pa. 1971), aff'd. 459 F. 2d 1057, cert den., 409 U.S. 888." This Court concludes based on the aforementioned case, that the contention of the Petitioner is without merit. The other issues the Petitioner raises conerning the alleged unconstitutionality of Georgia law and practices concerning the death penalty, are without merit. The United States Supreme Court in Gregg v. Georgia, 428 U. S. 153 (96 S.Ct. 2909, 49 L.Ed 2d 859) approved and affirmed Georgia's death penalty law and procedure. In Gregg v. Georgia, supra, the United States Supreme Court stated: "In sum, we cannot say that the judgment of the Georgia Legislature that capital punishment may be necessary in some cases is clearly wrong, Consideration of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe."

VII.

The next issue this Court will deal with concerns the allegation of the Petitioner that her rights under the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, and Art. I, Sec. I, Paragraph I, XI, and XIV of the Constitution of the State of Georgia were violated because the trial court failed to assure a non-capricious sentencing process. In this general allegation the Petitioner states the following: (1) The trial jury was not instructed to avoid any influence of passion, prejudice, or any other arbitrary factor when imposing sentence. (2) The trial jury was only vaguely instructed as to mitigating circumstances. (3) The Georgia Code, at Sect. 27-2534.1, fails to enumerate or clearly define mitigating circumstances as do the codes of most other states with capital punishment permitted under a bifurcated process such as Georgia used. (4) The nature and control of the voir dire examination by the prosecution implied that a guilty verdict would require imposition of the death sentence during the sentencing process. (5) Because Petitioner was sentenced before the United States Supreme Court upheld the constitutionality of Georgia's death penalty statute, the jury could easily have believed Petitioner would never actually be executed. References in the prosecution's closing argument and the trial court's remarks and the speed with which the trial court's remarks and the speed with which the trial court hastened the sentencing process supported such a belief. (6) Because the guilty verdicts were returned late in the evening, the sentencing hearing and jury deliberation were held quite late at night, Petitioner was deprived of full consideration by a fresh, attentive jury. The Petitioner contends because she was sentenced before the United States Supreme Court upheld the constitutionality of the Georgia's death penalty statute, the jury could easily have believed the Peti-

tioner would never actually be executed. The Petitioner further contends that references in prosecution's closing argument and the trial court's remarks and speed with which the trial court hastened the sentencing process quoted such beliefs. From the testimony and evidence presented to this Court, it appears that Petitioner is raising the "Private Slovik Syndrome" again. However, as mentioned earlier in a ruling of this Court in this order, the Supreme Court of Georgia held in House v. Stynchcombe, et al., 239 Ga. 222 (236 S.E. 2d 353) concerning the "Private Slovik Syndrome": "There is no legal basis for asserting the contentions of appellant during this state's existing post-conviction relief procedures. Appellant should have resolved such contentions upon proper request during voir dire. The time for selecting a fair and impartial jury is upon voir dire. United States v. Farries, 328 F. Supp. 1034 (3) (DC Pa. 1971), aff'd 459 F2d 1057, cert. den., 409 U.S. 888." Therefore, this contention of the Petitioner is without merit.

The next issue this Court will deal with under the general allegation that the trial court failed to assure a non-capricious sentencing process, is that Georgia Code Ann. Section 27-2534.1 fails to enumerate or clearly define mitigating circumstances as do the codes of most other states with capital punishment permitted under a bifurcated process such as Georgia used. Ga. Code Ann. Section 27-2534.1 was approved in Gregg v. Georgia, 428 U.S. 153 (96 S.Ct. 2909, 49 L.Ed. 2d 859). Therefore, this particular contention of the Petitioner is without merit.

The next contention this Court will deal with under the general contentions that the trial court failed to assure a non-capricious sentencing process, is the contention that the nature and control of the voir dire

examination by the prosecution implied that a guilty verdict would require imposition of the death sentence during the sentencing process. This contention is without merit. Any improper questioning under the voir dire could have been objected to by Petitioner's counsel. Also, this Court has examined the voir dire in the situation and can find no error in it.

The other contentions raised by Petitioner were: that the trial jury was not instructed to avoid any influence of passion, prejudice, or any other arbitrary factor when imposing sentence; that the trial jury was only vaguely instructed as to mitigating circumstances; and that because the guilty verdicts were returned late in the evening, the sentencing hearing and jury deliberation were held quite late at night, that Petitioner was deprived of full consideration by a fresh, attentive jury. These contentions are without merit. These contentions are potentially only errors of law. Habeas corpus does not lie to correct the mere errors of law, and is not designed to be used as substitute for alleged review of alleged trial errors. Aikens v. Martin, 229 Ga. 815 (194 S.E. 2d 463); Buxton v. Brown, 222 Ga. 564 (150 S.E. 2d 636); Bims v. Balkcom, 220 Ga. 7 (136 S.E. 2d 766).

VIII.

The Petitioner in her Petition for Writ of Habeas Corpus now alleges that her rights under the Sixth and Eighth Amendments and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, Art. I, Sec. I, Paragraph I, XI, and XIV of the Constitution of the State of Georgia were violated because the Supreme Court of Georgia failed to provide an impartial appeal or sentence review. The Petitioner alleges the following facts: (1) Petitioner's case was consolidated on appeal with that of her husband who, although he was convicted of the same murders at a separate trial, was alleged to have done and was convicted of doing the actual

killing; that Petitioner was admitted by the prosecution to have been in the Miami, Florida, area when the murders occurred. (2) Said consolidated appeal denied Petitioner the right to confrontation as to testimony from the transcript of her husband's trial which might have been harmful to her. (3) The Supreme Court of Georgia did not inform Petitioner in advance with which other sentences hers would be compared, in order that her counsel might present argument as to the relevancy or irrelevancy thereof. (4) The Supreme Court of Georgia did not compare Petitioner's sentences with other cases in which the death penalty was not imposed. (5) Many of the other cases with which Petitioner's sentences were compared arose under the Georgia death penalty statute declared unconstitutional by the United States Supreme Court in 1972, and were therefore lacking facts about the "Defendant" as opposed to the "crime". (6) The universe of cases used for comparison was irrational, because only those of which records were available were used, thereby excluding those from which no appeal was taken. (7) The statute does not require articulated findings where the sentence of death is not imposed. The Petitioner alleges that the Supreme Court of Georgia was prejudicial to the Petitioner in consolidating her appeal with the appeal of her husband, Tony Machetti, who was tried separately. This contention was raised by the Petitioner in her original petition for certiorari to the Supreme Court of the United States. The Petitioner contends that this consolidation denied her right of confrontation as to testimony from her husband's trial which was harmful to her, and further alleges that it was prejudicial as Petitioner's husband was directly involved in the murder as opposed to what Petitioner calls her "indirect" involvement in the murders of which she was convicted. The record in this case shows that Rebecca

Machetti and her husband were indicted by the same Grand Jury in Bibb County, Georgia, each on two identical counts of murder. Both the Petitioner and her husband received individual trials on these charges. However, the Supreme Court of Georgia in deciding the individual appeals of Petitioner and her husband, who were represented by separate counsel on appeal and had separate arguments on appeal, merely wrote a consolidated opinion deciding the appeal of the Petitioner and her co-defendant husband. See: Smith v. State, 236 Ga. 12 (222 S.E. 2d 308). By reference to the Supreme Court of Georgia's opinion, it becomes immediately apparent from the style of the case, that the appeals of the Petitioner and her husband were docketed separately. There is even a notation which indicates that this is an opinion deciding "two cases". Obviously, this decision was an exercise of judicial enonomy, as the same underlying fact situation was present in both the case of Petitioner and her husband, including the fact that the major State's witness in both cases was John Maree. In addition, they were appealing from convictions for identical offenses for which they received identical sentences, regardless of the nature of their individual involvement, on which the jury based their finding of guilt. It is further clear from the Supreme Court of Georgia's opinion, that although the opinions in the two cases were consolidated when they were published, the cases were considered separately by the Georgia Supreme Court. For example, the Supreme Court of Georgia noted that the enumeration of error Number 11 was made only by Tony Machetti. In other portions of the opinion, the Court noted that both Petitioner and her husband had raised a particular contention.

In the portion of the opinion dealing with sentence review, in which the Petitioner states the

consolidation of the two cases was even more prejudicial, the Court stated what each separate jury had decided in the separate trials of Petitioner and her husband. The Supreme Court of Georgia followed the proper statutory procedure under Ga. Code Ann. Section 27-2534.1 (c) (3), which was upheld as constitutional by the United States Supreme Court in Gregg v. Georgia, 428 U.S. 153 (96 S.Ct. 2909, 49 L.Ed. 2d 859). The Supreme Court of Georgia upheld the duty imposed upon them by statute of determining, "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." The Petitioner argues that the Supreme Court of Georgia "forced these two cases into a common mold", which denied her due process and was prejudicial to her. Specifically, she cites the statutory required list of similar cases cited by the Supreme Court of Georgia, as relating more toward the case of Petitioner's husband than to the facts as presented in her case. The Supreme Court of Georgia referred to the findings of the juries in the Petitioner's case and that of her husband separately, revealing that the same aggravating circumstance was used as the basis for the imposition of the death penalty in both cases, i.e., Ga. Code Ann. Section 27-2534.1 (b) (4). Regardless of Petitioner's argument that the case of Petitioner and her husband should not be placed in the same "mold", the fact remains that the same aggravating circumstance was found in both cases and both Defendants were convicted of identical offenses and received two consecutive death sentences. Petitioner discusses in detail the cases cited by the Supreme Court of Georgia as similar cases which were considered in determining whether the sentences of death in Petitioner's case were excessive and disproportionate. This Court will not consider each of these cases individually,but would merely point out that the Supreme Court of Georgia stated that it selected the cases cited for comparisons because

each of them dealt with fact situations in which a death sentence for murder was involved or where life sentences were involved with another simultaneous murder, from the period of January 1, 1970, until the decision in Petitioner's case, in January of 1976. Thus, the Court was not basing the similarities of the cases on the fact that, using Petitioner's terminology, there was a direct and indirect participant in the crime, but rather that there was a death sentence imposed for murder, or their life sentences were imposed for murder where another simultaneous murder was involved. The Supreme Court of Georgia specifically cited the pattern which an examination of these cases reveals, i.e., that where a jury was authorized to impose a death penalty for multiple murders, they imposed the death penalty on at least the principal offender when more than one offender was involved. It cannot be stated that the Supreme Court did not realize that more than one offender was involved in the case at hand. Nor can it be said, that the Supreme Court of Georgia, in examining these similar cases, did not consider any possible differences in the role of the Petitioner and her husband in determining that the death penalty for murder was not excessive or disproportionate. Although the Petitioner claims that the sentence review process was meaningless, it is this Court's belief that this review was in accordance with the statutory procedures which does not set forth the basis upon which similarities between the Petitioner's case and others must be based. The Supreme Court of Georgia is free to determine what cases may be similar in making this sentence review.

To say that merger of Petitioner's appeal and sentence review with that of her husband violated her due process rights is to also contend that the Supreme Court of Georgia has <u>not</u> done its duty as required by law. This Court does <u>not</u> feel that such is true in any sense.

Ga. Ann. Code Sect. 27-2537 Review of death sentences provides among other procedures, terms and conditions that: "...(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal. (c) With regard to the sentence, the court shall determine: (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and (2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 27-2534.1 (b), and (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. ... (e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to: (1) Affirm the sentence of death; or (2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of Georgia in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration. (f) There shall be an Assistant to the Supreme Court, who shall be an attorney, appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. The court shall accumulate the records of all capitol felony cases in which sentence was imposed after January 1, 1979, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a synopsis or brief of the facts of the record concerning the crime and the defendant. ..." (Emphasis supplied.).

A conspiracy to commit a crime may be formed in one county, committed by one of the conspirators in another county, but such will not lessen the responsibility of the conspirator who remains in the first county while the crime is being committed in the other. Danzley v. State, 25 Ga. App. 170 (11), at p. 171 (102 S.E. 915). It has been held likewise that a conspiracy to commit a crime may be proved, though not alleged in the indictment, and, in other words, it is not, in fact, necessary to allege a conspiracy in an indictment. Bruster v. State, 228 Ga. 651 (3), at p. 656 (187 S.E. 2d 297) and cit.

The rule is, that "Where several persons conspire to do an unlawful act, the acts and declarations of one of them pending the enterprise are admissible in evidence against the others, although the former may not be on trial or indicted." Slaughter v. State, 115 Ga. 584 (2) (41 S.E. 992). "A conspiracy is defined as a combination agreement between two or more persons to do an unlawful act. The existence of a conspiracy may be established by proof of acts and conduct, as well as proof of an express agreement." Stevens v. The State, 8 Ga. App. 217 (3) (68 S.E. 874). A conspiracy may be shown by circumstances and a conspirator is fully responsible for what other members of the conspiracy do in pursuance of the conspiracy. Cummings v. State, 127 Ga. App. 695 (194 S.E. 2d 629) and cit. See also Hutchins v. State, 229 Ga. 804, at p. 805 (194 S.E. 2d 442).

The Supreme Court of Georgia in Hall v. State, 241 Ga. 252 (____S.E. 2d ____) where the trigger man had received only a life sentence held that the death sentence of the defendant Hall, who was not the trigger man, was vacated and the trial court ordered to enter a life sentence also held: "This court has many times affirmed the death penalty for the triggerman where the other

participants did not receive a similar sentence. E.g., Bowden v. State, 239 Ga. 821 (238 S.E. 2d 905) (1977); Pulliam v. State, 236 Ga. 460 (224 S.E. 2d 8) (1976); Dobbs v. State, 236 Ga. 427 (224 S.E. 2d 3) (1976); Ross v. State, 233 Ga. 361 (211 S.E. 2d 356) (1974); Floyd v. State, 233 Ga. 280 (210 S.E. 2d 810) (1974); Gregg v. State, 233 Ga. 117 (210 S.E. 2d 659) (1974). We have also affirmed death sentences for more than one, but not necessarily all of the participants in a criminal transaction. E.G., Thomas v. State, 240 Ga. 393 (242 S.E. 2d 1) (1977); Stanley v. State, 240 Ga. 341 (241 S.E. 2d 173) (1977); Gaddis v. State, 239 Ga. 238 (236 S.E. 2d 594) (1977); Birt v. State, 236 Ga. 815 (225 S.E. 2d 248) (1976); Dungee v. State, 237 Ga. 218 (227 S.E. 2d 746) (1976); Isaacs v. State, 237 Ga. 105 (226 S.E. 2d 922) (1976); and Coleman v. State, 237 Ga. 84 (226 S.E. 2d 911) (1976)."

Also the Court in reaffirming Hill v. State, 237 Ga. 794 (229 S.E. 2d 737) (1976) also held that: "We intend to make clear that we are not creating a per se rule that where the triggerman does not receive the death sentence, it may not be imposed on other participants in the crime. Such distinctions will be made only in a case by case determination. See, e.g., Hawes v. State, 240 Ga. 327 (240 S.E. 2d 833) (1977) (Hill, J., concurring specially) (death penalty reversed on other grounds)."

Although many of the cases may not have been totally comparable and on all fours with the instant case, those in which double murders had occurred and those in which a conspiracy was believed present by direct or circumstantial evidence would certainly be as similar and comparable as available. If there is no case on all fours with the instant case, does justice require that the death sentence <u>not</u> be imposed, where all statutory prerequisites have been found to exist by the jury, and the jury based

on the evidence has found at least one statutory aggravating circumstance and recommended the death penalty. To conclude such would be an utter absurdity.

The failure of the Georgia Supreme Court to consider similar cases in which the death penalty was not imposed is even more significant, but likewise ridiculous. There would be no end to the amount of time required for the automatic and mandatory appeal and review of each death sentence.

Even Petitioner's brief relates: "A search of all reported appellate opinions in post-1954 cases of executions for homicide reveals only six cases out of 363 in which clearly identifiable non-triggermen were executed, except in murder for hire cases." This shows the limited number, if held to a strict review only of identically similar cases.

Therefore, this Court concludes from the evidence presented, it was not error to consolidate the opinion in the Petitioner's case and that of her husband, and as the sentence review was conducted in accordance with statutory procedures, this particular contention of the Petitioner is without merit.

IX.

The next issue for this Court to determine is that the Petitioner alleges that her rights under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, and Art. I., Sec. I, Paragraph I, XI of the Constitution of the State of Georgia were violated because the trial court refused to let her introduce evidence which would strengthen her defense. The Petitioner states: (1) Evidence was excluded which could have impeached a key prosecution witness; (2) Evidence was excluded which could have corroborated Petitioner's story about events preceding the murders; (3) Evidence

was excluded which would have shown that at least one key prosecution witness had sufficient interest in getting revenge against Petitioner to frame her; (4) Evidence was excluded to support other theories as to who committed the murders and why; (5) Petitioner's counsel at trial was not permitted to ascertain whether or not the members of the jury understood the concept of "reasonable doubt"; (6) Petitioner's counsel at trial was not permitted a copy of a prior confession of one witness which would have impeached his testimony at trial. It appears to this Court that these allegations by the Petitioner concerns certain evidence was improperly excluded by the trial court which would have been helpful to her. Habeas corpus does not lie to correct any errors of law and is not designed to be used as a substitute for alleged review of alleged trial errors. Atkins v. Martin, 229 Ga. 815 (194 S.E. 2d 463); Buxton v. Brown, 222 Ga. 564 (150 S.E. 2d 636); Sims v. Balkcom, 220 Ga. 7 (136 S.E. 2d 766). The purpose of the writ of habeas corpus is to ferret out the deprivation of a constitutional right. Gooding v. Dudley, 232 Ga. 321 (206 S.E. 2d 490). Also, the Petitioner's attorney testified that he used all the evidence he had during the guilt phase of the trial. Therefore, this Court concludes the contentions of the Petitioner is without merit.

X.

The Petitioner raising the contention that the time set for execution was established in violation of Georgia statutory procedure and therefore in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States as defined by such statute, in that the trial judge did not set a time and date certain, but established only the method by which the time and date of execution might be determined by those responsible for executing the sentence. The Petitioner further contends

that the trial judge, in fixing sentences, provided that the execution of the Defendant would take place on the 15th day following receipt in the trial court of remittitur from the Supreme Court of Georgia. The Petitioner contends that Georgia statutory law provides that the trial judge will set a date certain for the execution of the Defendant. While this Court feels that the trial judge felt that the same was a date certain under the terms of Ga. Ann. Code Sect. 27-2519 (1070 P.C.) Sentence to specify time and place of its execution; ... , which reads in pertinent part as follows: "When a convict is sentenced to the punishment of death, the court shall specify the time of execution in the sentence. The time shall not be less than 20 days nor more than 60 days from the date of the sentence." (Emphasis supplied), this Court does not feel that it was within the wording "nor more than 60 days from the date of the sentence", which appears to be the maximum time that a date of execution can be set in the original sentence. Ga. Ann. Code Sect. 27-2518 Change of date for execution; limit for new date; record of order reads in pertinent part as follows: "Where the date of execution of any such convict in a capital case has passed by reason of a supersedeas incident to the suing out of a bill of exceptions to the judgment of the trial court, or a respite by the Governor, or for any other reason, the judge of the superior court of the county where the case was tried shall have power and authority without requiring the convict to be brought before him by habeas corpus, as provided in section 27-2521 to pass an order in term time or vacation fixing a new date for the execution of the original sentence ... The judge shall fix the new date not less than 10 nor more than 20 days from the date of such order." (Emphasis supplied.).

It appears to this Court that the provisions of 27-2518, supra, will require the setting of a new date within the time limits therein provided once all of the appeal, habeas corpus and other remedies have been exhausted. It appears to this Court that the execution was not carried out on the 15th day following receipt in the trial court of the remittitur from the Supreme Court of Georgia, and that this is at this point, a moot allegation. A moot case is one that seeks to determine an abstract question, which does not arise upon existing facts and rights. Byrd v. Equitable Life Assurance Society, 185 Ga. 628 (196 S .E. 63). Therefore, this contention of the Petitioner is moot, and without merit.

XI.

The next issue raised by Petitioner is that the imposition and execution of Petitioner's death sentences violates the Sixth and Fourteenth Amendments to the Constitution of the United States and Art. I, Sec I, Paragraphs I, XI, and XI of the Constitution of the State of Georgia, by denying her trial by representative way. The Petitioner alleges that she was deprived of her fundamental right to indictment and trial by a jury selected from a representative cross-section of the community, and the failure of her trial counsel to object to the composition of the traverse or grand jury pools deprived her of her right to the effective assistance of counsel. In her petition for writ of habeas corpus the Petitioner alleges the following facts: (1) The sentences were imposed pursuant to the verdict of a jury selected through procedures that systematically excluded from jury service all persons having conscientious or religious scruples against capital punishment, without sufficient individualized examination of the beliefs of each particular excluded venireman; (2) The sentences were imposed pursuant to the

verdict of a jury from which all persons having conscientious or religious scruples against capital punishment were systematically excluded, with the result that the jury did not constitute a representative cross-section of the community; (3) All persons having conscientious or religious scruples against capital punishment were systematically excluded from the jury which determined Petitioner's guilt or innocence, thereby depriving Petitioner of a vital constitutional right, her right to a jury selected from a representative cross-section of the community, without furthering any permissible state interest; (4) She was convicted and sentenced to die by a jury that did not reflect a representative cross-section of the community and was not impartial in fact, but was unrepresentative and biased in favor of the prosecution on the issue of Petitioner's guilt of the crimes with which she was charged; (5) Under Section 59-112 of the Georgia Code, women who are housewives with children 14 years of age or younger may be excused from jury duty merely by request; men in a similar status do not have a comparable right. The test which must be applied was set out by the Supreme Court of Georgia in Pass v. Caldwell, 231 Ga. 192 (1973) (200 S.E. 2d 720), which held: "It was held in United States v. Hyde, 448 F.2d 812, 824 that the defendant always has the burden of showing jury discrimination. Evidence of 'spectacular' underrepresentation meets the burden, making a prima facie case of discrimination. The burden of going forward then shifts to the government to explain the figures in a non-discriminatory way. The requirements for making out a prima facie case of jury discrimination are two fold. First, appellant must prove that an opportunity for discrimination on account of race existed on the grounds that the source from which the

potential jurors was drawn was racially biased, and second, that the use of such an 'infacted source' produced a significant disparity between the percentages of blacks found present in the source and those actually appearing on applicant's grand and petit jury panels." Also see: Whitus v. Georgia, 385 U.S. 545 (87 S.C. 643, 17 L.E. 2d 599); Wright v. Smith, 474 F. 2d 349, 351 (5th Cir. 1973); and Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed. 2d 690, in which the Supreme Court said: "It should be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement but that petit jury actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition. Foy v. United States, 342 U.S. 261, 284 (867 S.Ct. 1613, 1625, 91 L.Ed. 2d 2043) (1947); Apadaca v. Oregon, 406 U.S. at 414, 92 S.C. at 634 (Purality Opinion); but the jury rules, pools of names, panels, or venires from which the juries are drawn, does not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." The evidence presented at the habeas corpus hearing of the Petitioner shows that the traverse jury was composed of the requisite twelve members, of whom one was a female, and three were black. Both Mr. Adam Greene, Clerk of the Superior Court of Bibb County at the time the jury utilized in the Petitioner's trial was established, and Mr. K. B. Hardwick, Jr., foreman of the jury commission who established the jury box utilized in Petitioner's trial, were present at the Petitioner's habeas corpus hearing and testified concerning the establishment of this jury box. The jury commission at the time was composed of six male jury commissioners, two of whom were black. The jury commission

set forth steps to be used in revising the jury box in 1973 which was admitted into evidence at the habeas corpus hearing. Mr. K. B. Hardwick, Jr. testified at the habeas corpus hearing concerning the specific procedures utilized in compiling the grand and traverse juries. First, he testified that the names of prospective jurors from the outgoing box would be drawn and then from the voter registration list the commissioner would obtain as many names as possible and send out questionnaires for prospective jurors. In addition to the voter registration list, the jury commissioners also used personal knowledge, the city directory and telephone calls, to supplement this list and insure a representative cross-section. He stated that only the females that requested exclusion were eliminated from the jury list. In addition to other supplementation, the jury commission would make spot checks of the list to determine if blacks and females were represented in fair proportion. The five commissioners were divided in teams to compare the male-female and black-white ratio to see if the jury list was running in proper balance. Petitioner's Exhibit No. 3 reveals that in order to prove the black ratio, the following was done: "(a) The voter list was gone over for names of apparently qualified blacks to whom questionnaires were sent but who did not return it: 'Setup' cards were made up and included. (b) Some 'borderline' whites were pulled." The evidence shows that the jury box in effect at the time of the Petitioner's trial was established on February 27, 1974. The evidence also shows that the entire traverse jury box was selected from the registered voters list, and that a survey of the number of blacks and women in the box was made only about three-fourths of the revision of the names. At the time of the survey, the box was composed of 19% blacks and 18% women. In 1970 census reported 34% blacks in Bibb County, and 54% of Bibb County's

population was female. It appears to this Court from the testimony and evidence presented that the Petitioner has now shown that an opportunity for discrimination existed from the source of the jury list, and secondly, though they show some disparity between the percentages of blacks and women in the traverse and grand jury boxes and the percentages of blacks and women in the population, the Petitioner has not shown the significant disparity necessary for finding that a jury was non-representative. As to the ineffective assistance of counsel claim, it appears to this Court that since there was no illegality in the composition of the juries, Counsel was not ineffective in failing to challenge the juries as being non-representative. Therefore, this Court concludes from the testimony and evidence presented, that the contentions of the Petitioner are without merit.

XII.

The next contention raised by the Petitioner is that she was convicted on the basis of information obtained in violation of her privilege against self-incrimination under the Fifth and Fourteenth Amendments to the Constitution of the United States, and Art. I, Sec. I, Paragraph XIII of the Constitution of the State of Georgia. The Petitioner contends: (1) Evidence was offered against the Defendant at the trial consisting of statements made by the Defendant to law enforcement officers; (2) The said statements of the Defendant to law enforcement officers were incriminatory as to the question of the existence of aggravating circumstances and to the question of guilt, in that statements were introduced regarding the Defendant's knowledge of the existence of certain insurance policies and statements were introduced regarding the Defendant's providing the officers with an alibi for persons accused of the actual

act of killing; (3) The said statements were made involuntarily to the officers and without the proper warnings regarding the Constitutional rights of the Defendant with respect to self-incrimination and representation by counsel. This Court has made a thorough examination of this allegation of the Petitioner. From the testimony and evidence presented to this Court, this Court cannot find any violation of Petitioner's privilege against self-incrimination under the United States Constitution or the Constitution of Georgia. Therefore, the contention of the Petitioner is without merit.

After hearing all the evidence in this case, and based upon the findings of fact and conclusions of law in this order, this Court concludes that none of Petitioner's constitutional rights were violated and that Petitioner's conviction and death sentences are lawful and Petitioner is not being illegally held nor detained without proper authority.

THEREFORE, IT IS CONSIDERED, ORDERED, AND ADJUDGED, because of the above stated reasons, that Petitioner's Motion for Writ of Habeas Corpus, be, and the same is hereby, denied, and Petitioner is remanded to the custody of Harold L. Hurley, Acting Warden, Georgia Women's Correctional Institution, Respondent, for further action appropriate to law.

It is further ORDERED that the stay of execution entered by this Court on January 9, 1978, is hereby dissolved, and that a copy of this order be served upon the Honorable C. Cloud Morgan, Judge, Superior Courts, Macon Judicial Circuit, and Honorable Donald Thompson, District Attorney, Macon Judicial Circuit.

SO ORDERED, this 9th day of May, 1979.

Joseph B. Duke

Joseph B. Duke
Judge, Superior Courts
Ocmulgee Judicial Circuit

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF GEORGIA

MACON DIVISION

FILED
at 4:40 P.M.
MAR 24 1981
Deputy Clerk, U.S. District Court
MIDDLE DISTRICT OF GEORGIA

REBECCA A. MACHETTI, a/k/a REBECCA A. SMITH,	:	
Petitioner,	:	
VS.	:	CIVIL ACTION NO. 79-210-MAC
L. Q. LINAHAN, Warden, Georgia Women's Correctional Institution,	:	MAG NO. 81-0005-M
Respondent.	:	

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The petitioner in this 28 U.S.C. §2254 action is presently under two consecutive death sentences imposed by the Superior Court of Bibb County following her conviction by jury in that court on March 1, 1975, of two murders. Petitioner appealed her conviction directly to the Supreme Court of Georgia, which affirmed her convictions and sentences in Smith v. State, 236 Ga. 12 (1976), cert. den. 428 U.S. 910 (1976). Petitioner then sought habeas corpus relief in the Superior Court of Baldwin County, Georgia, and, following a full and fair evidentiary hearing commencing March 2, 1978, that court denied the petition by order dated May 9, 1979; the Supreme Court of Georgia agreed and denied petitioner's application for a certificate of probable cause to appeal on July 10, 1979. A timely motion for reconsideration was denied by the Supreme Court of Georgia on July 17, 1979. Petitioner then sought federal habeas corpus relief in this Court with the filing of her petition on August 30, 1979.

The record demonstrates that petitioner has fully exhausted her state remedies and likewise shows that petitioner

was afforded a full and fair hearing on all pertinent issues and, accordingly, the findings of fact included therein shall be presumed correct. 28 U.S.C. §2254(d).

Petitioner asserts the following enumerations of error, to-wit:

(1) She was denied the effective assistance of counsel at the pre-trial, trial, and appellate levels of her case;

(2) The prosecuting attorney made improper, inflammatory, and highly prejudicial remarks during the course of the trial and his arguments to the jury;

(3) The merger of petitioner's appeal and sentence review with that of her husband violated due process;

(4) The grand jury which indicted her and the petit jury which convicted her were discriminatorily and unconstitutionally composed;

(5) The state failed to disclose its key witness' plea bargain and to allow use of his confession at trial;

(6) The state improperly used petitioner's silence and her failure to shed tears at the trial of the case;

(7) Evidence which would have helped petitioner was excluded at trial;

(8) Petitioner was given "mind-altering" drugs during her trial; and

(9) The death penalty, as applied in petitioner's case, is unconstitutional because it was applied arbitrarily, discriminatorily on grounds of race and poverty, and constitutes cruel and unusual punishment.

ASSISTANCE OF COUNSEL

The question of whether petitioner received effective assistance of counsel is a mixed determination of law and fact that requires the application of legal principles to

the historical facts of the case. Thus, this Court is not bound by the finding in the state habeas corpus proceeding that petitioner received effective assistance of counsel as a matter of fact. Cuyler v. Sullivan, 446 U.S. 335 (1980). The state fact finding procedures, however, were adequate in this case on the issue of effectiveness of counsel and the factual issues pertinent thereto were fully and fairly developed at the state habeas corpus proceeding. This is true of all issues raised by petitioner in this proceeding. Accordingly, no evidentiary hearing is required. West v. Louisiana, 478 F.2d 1026 (5th Cir. 1973), 510 F.2d 363 (5th Cir. 1975) (en banc.) (Part II aff'd and adhered to in relevant part).

Petitioner claims that her retained trial counsel was ineffective because of his failure to seek change of venue, conduct an adequate voir dire examination, subpoena "vital" witnesses, present evidence favorable to petitioner, obtain discovery, question the state's key witness concerning his plea bargain, move to suppress illegally seized evidence, raise the defense of insanity, move for mistrial, make timely objections, and present evidence at the penalty phase of the trial. Additionally, petitioner alleges that her retained counsel consistantly confused names, dates, facts, and essentially bumbled his way through the trial and appellate process.

Such claims of ineffective assistance of counsel require the Court to inquire into the actual performance rendered by counsel based on the totality of the circumstances. Lovett v. Florida, 627 F.2d 706 (5th Cir. 1980). The right to counsel guaranteed by the Sixth Amendment gives one the right to effective counsel, not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance. Hill v. Wainwright, 617 F.2d 375 (5th Cir. 1980); Herring v.

Estelle, 491 F.2d 125 (5th Cir. 1974); MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960).

Changes of venue in criminal cases in Georgia are governed by Ga. Code Ann. §27-1201 which warrants a change when either an impartial jury cannot be obtained or there is a probability of danger or violence. A review of the record in this case does not reveal any facts in support of either ground for a change of venue. This Court joins in the reasoning of petitioner's trial counsel that a motion for change of venue was inappropriate in this case. There was certainly no threat of danger or violence and the voir dire examination of the jury panel revealed that the majority of the jurors had no prior knowledge of the case or, if they had, it did not impede their ability to render an impartial verdict. Thus, failure to seek a change of venue was not error.

Petitioner's charge of ineffectiveness leveled at her trial counsel's voir dire examination of prospective jurors does not reach constitutional magnitude and is without merit. The record reveals that petitioner's trial counsel surveyed the jury list prior to trial to gleen pertinent information concerning the jurors and conscientiously endeavored and prepared to eliminate veniremen who might have had a preconceived bias against petitioner. Counsel questioned prospective jurors about pre-trial publicity and its possible effect on them, employment, marital status, families, acquaintances with involved law enforcement officers, areas of residence, religious preferences, reasonable doubt, past criminal jury service, and open-mindedness. Petitioner's trial counsel also had the benefit of probing voir dire questions asked by the prosecutor concerning service on grand juries and relationships to the victims, petitioner or the prosecutor. Certainly not all questions capable of

detecting preconceived bias were asked. Trial counsel did, however, conduct a constitutionally sufficient voir dire examination.

Petitioner's trial counsel failed to subpoena petitioner's daughter who, according to petitioner, could have contradicted the testimony of the state's key witness. The record reveals that trial counsel made the decision not to subpoena any of petitioner's three daughters because he felt there was no need for a subpoena to guarantee their appearance at trial. Theretofore the three daughters had been extremely cooperative and petitioner's mother had assured trial counsel that she would have them present for the trial. Additionally, trial counsel chose not to subpoena petitioner's daughters because he did not want to put the prosecutor on notice that he may call them as witnesses. The record reveals that trial counsel had no reason to suspect that the daughter petitioner contends was a "vital" witness would disappear three days before the trial and purposely make herself unavailable to testify on behalf of her mother. This Court does not find petitioner's trial counsel to have rendered ineffective assistance of counsel by failing to subpoena petitioner's daughters.

Petitioner contends that her trial counsel rendered ineffective assistance by failing to use evidence and witnesses which could have corroborated her testimony and impeached the testimony of the state's key witness. Such contention is not supported by the facts. At the state habeas corpus hearing, petitioner testified that she gave her trial counsel various leads and information upon which he failed to capitalize. Trial counsel, on the other hand, denied that he was given any such leads or information and stated that he introduced all the evidence he had during the guilt phase of the trial. The state habeas corpus court's acceptance of petitioner's

trial counsel's testimony is recognized and adopted by this Court. This contention of petitioner is without merit.

Petitioner next argues that her trial counsel rendered ineffective assistance in failing to request a preliminary hearing and failing to file a Brady motion to obtain discovery from the state. Petitioner's counsel had attended the four-day trial of petitioner's husband, in which the state presented essentially the same evidence it presented at petitioner's trial. The record reveals that there was no evidence in the possession of the state which could have been subject to a Brady motion. Thus, from the record, it appears that any discovery would not have revealed any further evidence which would have been helpful to petitioner and, therefore, her trial counsel's failure to make such a motion does not constitute ineffective assistance of counsel.

Petitioner next challenges her trial counsel's failure to ask the state's key witness if he had received any promise of sentence reduction or plea bargaining in exchange for his testimony on cross examination. The record does not support such a charge. The witness' "expectations" were put before the jury when trial counsel questioned the witness about his future plans to "marry Vicky and buy a little farm when you get out of this mess" and "getting a passport and leaving the country." Without going directly into any plea bargaining process between the witness and the state, petitioner's trial counsel adequately confronted the jury with the chance of the witness' motive being self-improvement.

Petitioner next contends that her trial counsel erred in failing to move to suppress evidence which had been seized in violation of her Fourth Amendment rights. Petitioner testified at the state habeas corpus hearing that she was forced under coercion from law enforcement officers to sign

a piece of paper authorizing the search of her home after her home had already been searched. Several documents taken in the search of her home were used against petitioner at trial. Law enforcement officials, however, contradicted petitioner's testimony at the state habeas corpus hearing and presented evidence that the search of petitioner's home was made with her voluntary consent. The state habeas corpus court accepted the testimony of the law enforcement officials as does this Court. As there was no illegal search and seizure, petitioner's trial counsel did not err in failing to move to suppress evidence obtained in the legal search.

Petitioner asserts that her trial counsel should have raised an insanity defense on her behalf. A review of the record makes it apparent that petitioner's defense at trial was that of an alibi, based on her presence in another state at the time of the murders. Thus, the defense of insanity would not have been compatible with petitioner's mainline of defense at trial. Moreover, petitioner's trial counsel testified at the state habeas corpus proceeding that he did not consider petitioner to be insane. Petitioner's argument to the contrary is not persuasive.

Nor does this Court find that petitioner's trial counsel erred in failing to move for mistrial either when a juror became nauseated or needed medication in the form of an allergy shot. Having reviewed both incidences in the record, this Court concludes that petitioner's claim is totally without merit and unsupported by fact or legal authority. Neither instance would have warranted a mistrial even if such a motion had been made.

By failing to make various enumerated objections at trial, petitioner's trial counsel is alleged to have rendered ineffective assistance of counsel. A review of the trial

transcript reveals that her trial counsel made numerous appropriate objections throughout the trial. The mere fact that every conceivable objection to evidence was not raised during the trial does not establish ineffectiveness of counsel. Petitioner's trial counsel's failure to make any of the enumerated objections does not constitute error of constitutional proportion.

Petitioner's most serious challenge to the assistance rendered by her trial counsel centers on his failure to present any mitigating evidence during the sentencing phase of trial. At the state habeas corpus hearing, petitioner testified that she had suggested several witnesses for use at the penalty phase and gave her trial counsel their addresses, telephone numbers and summaries of what each could say. Her mother testified that she also gave trial counsel a list of character witnesses whose agreement to testify she had obtained. Petitioner's trial counsel testified, however, that neither petitioner nor her mother ever provided him with the names of any character witnesses to be called on petitioner's behalf. He stated that there were certain persons who petitioner states could have testified, but when asked to testify, they refused. It is apparent that the state habeas corpus court accepted the testimony of petitioner's trial counsel over that of petitioner and her mother. During the penalty phase no evidence was presented either in aggravation by the prosecution or mitigation by the defense. Some mitigating evidence, however, came in indirectly during the guilt-innocence phase of trial, specifically petitioner's absence from the scene of the crime. Petitioner's trial counsel stated that he had no evidence of mitigation at his disposal for the penalty phase. Petitioner's evidence as introduced at the state habeas corpus hearing is not sufficient to contradict the testimony of her trial counsel to the contrary.

Lastly, petitioner asserts that her trial counsel consistently confused names, dates and places during the trial and essentially bungled his way through the trial and appellate stages. A review of the record bears out some of petitioner's claim in this regard. Either naturally or by design, petitioner's trial counsel did confuse dates, names and places before the jury, but such acts or strategy in this case do not amount to errors of constitutional proportion, if errors at all. Some trial attorneys purposely adopt the "Columbo" approach before a jury with extremely successful results.

Applying the standard set forth in MacKenna, supra, to the facts developed at the state habeas corpus evidentiary hearing and the entire record in this case, this Court concludes that petitioner's attorney provided her reasonably effective assistance of counsel throughout all phases of her trial and initial appeal. Certainly petitioner is not satisfied with the results of her attorney's efforts or lack thereof, but the Sixth Amendment does not provide the right of satisfaction. Loftis v. Estelle, 515 F.2d 872 (5th Cir. 1975). Nor is this Court, armed with the benefit of hindsight and free from the pressures of courtroom battle, satisfied with each trial strategy chosen by petitioner's defense counsel. Most of petitioner's allegations as enumerated above involve questions of deliberate courtroom strategy. But, as the Court of Appeals for the Second Circuit stated in Cruz v. LaValle, 488 F.2d 671, 679 (2nd Cir. 1971), cert. den. 406 U.S. 958 (1972):

> A lawyer must be able to determine questions of strategy during trial, and unless there are exceptional circumstances or unless the lawyer is so incompetent as to deprive the defendant of the right to effective assistance of counsel, his decisionr egarding trial strategy must be binding.

In this case, any shortcomings or errors in judgment made by petitioner's attorney either do not in fact constitute

errors or do not rise to constitutional proportions and no exceptional circumstances exist to permit second-guessing his management of her trial. See Coco v. United States, 569 F.2d 367 (5th Cir. 1978).

In finding that petitioner received effective assistance of counsel, this Court is not applying a standard based upon historical and fictional distinction between retained and appointed counsel, which distinction has finally been erased by the Supreme Court in Cuyler, supra. Thus, there is no merit to the state's claim that there is a more stringent test for finding that counsel was ineffective when a defendant retains her own counsel. The test has been applied equally in this case and petitioner's counsel passed constitutional muster.

IMPROPER REMARKS BY PROSECUTION

Petitioner contends that she was denied a fair trial due to improper remarks and arguments made by the prosecutor. Improper jury arguments and misconduct by the prosecution do not present a claim of constitutional magnitude which is cognizable in proceedings under 28 U.S.C. §2254 unless such arguments and conduct, taken as a whole and in the context of the entire trial, were so prejudicial as to render the state court trial fundamentally unfair within the meaning of the Due Process Clause of the Fourteenth Amendment. Donnelly v. DeChristoforo, 416 U.S. 637 (1974); Easter v. Estelle, 609 F.2d 756 (5th Cir. 1980); Alvarez v. Estelle, 531 F.2d 1319 (5th Cir. 1976). A distinction must be made between conduct of the prosecutor which is improper or unwarranted but is not a denial of due process. See Easter v. Estelle, supra, at 760.

Petitioner contends that the prosecutor's closing argument created doubt in the minds of the jurors that any death sentence would be carried out, thereby encouraging

them to take the consequences of their verdict less seriously. Petitioner selects the following excerpts from the prosecutor's closing argument as being illustrative of such contention, to-wit:

> . . . I can't think of all the things that you, the jury, should think of as you enter into this phase of the trial, as I am sure that many of you will think of things that are probably more appropriate than I will think of as you get into your juryroom and think about this grave matter. . .. There has been a lot of argument lately, I am sure many of you have read it, read about it, heard about it, about the death penalty. We have a lot of people in our society who say that we should have it. . . .. (T. 1176-77)

Additionally, petitioner relies upon the following segment of the prosecutor's closing argument:

> The Court, because of the way our law is, is going to charge you about these penalties, about your requirement to make these penalties concurrent with each other or consecutive, and I know I may sound a little bit foolish here asking you to return consecutive death sentences in this case, but I have my reasons for it. It is something that I cannot explain to you at this time. . .. (T. 1180)

A thorough examination of the prosecutor's closing argument, including the above-quoted excerpts, leads this Court to the conclusion that the argument did not render petitioner's trial fundamentally unfair. The mere fact that the prosecutor mentioned differing arguments concerning the death penalty and requested consecutive death sentences does not show that he created any prejudice in the minds of the jury so that they would "attach diminished consequences to their verdict." See Prevatte v. State, 233 Ga. 929, 931 (1975); American Bar Association Standards for Criminal Justice, 5.8(d).

Petitioner also objects to the prosecutor's reading of an excerpt from Eberhardt v. State, 47 Ga. 598 (1873) in the presence of the jury. Although the Supreme Court of Georgia has branded such recitations "improper," it has not found the same to be reversible error. See Drake v. State, 241 Ga. 583, 587 (1978); Hawes v. State, 240 Ga. 327 (1977). Neither does this Court.

Petitioner also enumerates several remarks made by the prosecutor during his arguments to the jury appealing to the passions and prejudices of the jurors and alluding to facts outside the evidence. This Court has reviewed the challenged segments of the prosecutor's argument and concludes that there were several instances when the prosecutor's comments were improper or unwarranted. However, it is the Court's opinion that the prosecutor's arguments in this case clearly were not so prejudicial as to deny petitioner a fair trial.

MERGER OF PETITIONER'S APPEAL AND SENTENCE REVIEW

Petitioner contends that the consolidation of her appeal with that of her husband, who was convicted in a separate trial for the same murders, denied her right of confrontation as to testimony from her husband's trial which was harmful to her, and further alleges that it was prejudicial as petitioner's husband was directly involved in the murders as opposed to what petitioner calls her "indirect" involvement in the murders for which she was convicted. A reading of Smith v. State, 236 Ga. 12 (1976) clearly reveals that the Supreme Court of Georgia gave due consideration to both appeals and merely wrote a consolidated opinion in the exercise of sound judicial economy. The two appeals were docketed separately and considered separately.

The main thrust of petitioner's argument is that the consolidation of appeals lumped her in the same "mold" as that of her trigger-man husband and that the statutory required list of similar cases cited by the Supreme Court of Georgia related more to the case of her husband than to the facts as presented in her case. The cases selected for comparison by the Supreme Court of Georgia were those from January 1, 1970, until the decision in petitioner's case in January, 1976, involving a death sentence for murder and

those involving life sentences during the same time period involving another simultaneous murder. The Georgia appellate review procedure for death sentences is constitutional. Gregg v. Georgia, 428 U.S. 153 (1976). The Supreme Court of Georgia has a statutory duty pursuant to Ga. Code Ann. §27-2537 to determine whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering the crime and the defendant. This duty was performed in the instant case. Smith v. State, 236 Ga. 12 (1976). This Court has reviewed the cases listed in the Georgia Supreme Court's comparative "proportionality review" and has concluded that an adequate sample of homicide cases was reviewed and considered by the Court in determining that petitioner's death sentence is not excessive or disproportionate to the penalty imposed in similar cases. There is no factual basis for petitioner's claim that the Supreme Court of Georgia, in examining these similar cases, failed to consider any possible differences between the participation of the petitioner as a co-conspirator and that of her husband, who was present at the scene of the murders and pulled the trigger. The lack of factually similar cases is readily recognized by petitioner in her brief when she reveals that a search of all appellate opinions in post-1954 cases of executions for homicide reveals only 6 cases out of 363 in which clearly identifiable non-trigger men were executed, except in murder for hire cases. This Court concludes from the record that it was not error to consolidate the opinion in petitioner's case with that of her husband and that the sentence review was conducted in accordance with constitutional, statutory procedures.

JURY COMPOSITION

Another ground upon which petitioner seeks habeas corpus relief is that the jury selection processes for grand and traverse juries in Bibb County, Georgia unconstitutionally discriminated on the grounds of sex and race, resulting in petitioner's being indicted and convicted by unconstitutionally-composed juries. Petitioner's trial counsel failed to challenge the composition of the juries by motion and to produce evidence in support of the alleged discrimination prior to trial. No enumeration of error or evidence concerning unconstitutional jury selection procedures was thereafter presented on direct appeal to the Supreme Court of Georgia. It was not until the state habeas corpus proceeding that petitioner's appellate counsel raised the jury composition issue.

At the time of petitioner's trial in February and March, 1975, the Georgia courts had established a decisional rule that a defendant's failure to object to the grand or traverse jury before or during trial waived that objection as a basis for habeas relief. Stewart v. Ricketts, 451 F.Supp. 911 (M.D. Ga. 1978). Normally federal courts should honor such a procedural rule by not allowing the convicted defendant to raise the jury claims in a federal habeas corpus proceeding. Francis v. Henderson, 425 U.S. 536 (1976). Where, however, the state habeas corpus court chose to litigate the merits of the grand and traverse jury issues despite the state imposed waiver, then a federal court must likewise examine the merits of the unlawful composition claim. Lefkowitz v. Newsome, 420 U.S. 283, 292 (1975); Newman v. Henderson, 539 F.2d 502 (5th Cir. 1976). In the instant case, the state habeas corpus court had before it petitioner's allegations of an unconstitutional grand and traverse jury and adjudicated the merits of the

allegations against petitioner. Thus, this Court must address the same issues. Newman v. Henderson, supra.

Petitioner's statistics show that 54% of Bibb County was female and 34% was black during the period from February, 1974 through September, 1975. Only 12% of the grand jury box and 18% of the traverse jury box were female and 27% of the grand jury box and approximately 22-25% of the traverse jury box were black during this same period. Thus, the absolute disparity between the population of Bibb County and the grand jury list was 42% with regard to women and 7% with regard to blacks. The absolute disparity between the population of Bibb County in the traverse jury list was 36% for women and 9-12% for blacks.

In Duren v. Missouri, 439 U.S. 357 (1979), the Supreme Court clearly set out the elements of a prima facie violation of the fair cross-section requirement: the defendant must show (1) that the group alleged to be excluded is a distinctive group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process. The court in Duren, supra, went on to hold that 15% female representation was not representative of the community.

With regard to blacks, this Court does not find the absolute disparities of 7% and 9-12% for grand and traverse jury lists to satisfy the second element required by Duren, supra. This Court declines petitioner's invitation to focus on comparative or standard deviation disparity and finds that the absolute disparities shown for blacks do not make out a constitutional violation. See United States v. Maskeny, 609 F.2d 183 (5th Cir. 1980).

Concerning women, however, this Court finds that petitioner has met the first two criteria set forth in Duren, supra.

Petitioner fails, however, to satisfy the third requirement of establishing that the underrepresentation of women was due to systematic exclusion of women in the jury-selection process. There can be no doubt that the underrepresentation of women in petitioner's case was caused by Ga. Code Ann. §59-124, repealed by Acts 1975, pp. 779, 780, which provided that any woman who did not desire to serve on a jury would be exempted from this duty if she notified the commissioners in writing to that effect. Potential women jurors already on the jury list were automatically sent cards in Bibb County to allow them the opportunity to exempt themselves, and certainly many of them did. Petitioner argues that Taylor v. Louisiana, 419 U.S. 522 (1975), decided on January 21, 1975, before petitioner's trial commenced on February 24, 1975, rendered the code section unconstitutional. Taylor, supra, held unconstitutional a state statute that automatically excluded the names of women from jury lists because they had failed to opt in by previously filing a written request for jury service. Georgia, however, permitted women to opt out upon request after their names were placed on the jury list. Thus, it was not until 1979 in Duren, supra, that the Supreme Court declared that states could not constitutionally permit all women to opt out from jury duty solely on the basis of sex. Robinson v. Kimbrough, 620 F.2d 468 (5th Cir. 1980). Thus, petitioner has not demonstrated that the underrepresentation of women in the final pool of prospective jurors was not due to the operation of Georgia's exemption statute. No other evidence presented by petitioner establishes that the underrepresentation of women on the grand and traverse jury which indicted and convicted petitioner was due to systematic exclusion of women in the jury-selection process. Her contention, therefore, is without merit.

PLEA BARGAIN AND CONFESSION

Petitioner contends that she was denied her due process rights by the state's failure to disclose its key witness' plea bargaining agreement and to allow use of his confession at trial. The record reveals that subsequent to petitioner's trial the state's key witness was allowed to enter a guilty plea in exchange for his testimony at petitioner's trial and, as a result, received concurrent life sentences. The facts in this case are distinguishable from those in Giglio v. United States, 405 U.S. 150 (1972) and Napue v. Illinois, 360 U.S. 264 (1959). In Giglio, supra, the prosecution's key witness was asked if he had been offered any consideration in exchange for his testimony and he gave a negative reply. The government in its closing argument stated that the witness had received no promise that he would not be indicted. Subsequent to trial, however, it was revealed that the witness had been offered immunity in exchange for his cooperative testimony. In Napue, supra, the state's principal witness testified in response to a question by the prosecutor that he had received no promise of consideration in return for his testimony. At that time the prosecutor then knew that this testimony was false and did nothing to correct it. In the instant case, there was no questioning from either the prosecutor or petitioner's counsel relating to any specific plea bargaining agreement between the state and the key witness. As previously noted, petitioner's counsel did cross examine the witness concerning his expectations and sufficiently conveyed to the jury the idea that the witness' testimony may be self-motivated. In this case there were no false statements made on behalf of the witness stating that he had not received any promise concerning prosecution from the state. This is not a situation involving the allowance

of false testimony by the prosecution. From the prosecutor's testimony at the state habeas corpus proceeding, it appears that any expectations the witness had concerning his own immunity from prosecution was based solely on his own expectations, and not anything that the state had promised him. Based on the record, this Court concludes that petitioner's contention is without merit.

SILENCE AND FAILURE TO SHED TEARS

Petitioner contends that her post-arrest silence was improperly used against her at trial by the prosecution's establishing her failure to disclose exculpatory evidence during police interviews and to elicit her failure to shed tears in the presence of law enforcement officers. In this regard petitioner relies upon the holding in Doyle v. Ohio, 426 U.S. 610 (1976). Doyle, supra, however, dealt with those situations in which a prosecutor attempts to impeach a defendant by cross-examining him as to his post-arrest silence after he had received the appropriate warnings required by Miranda v. Arizona, 384 U.S. 436 (1966). The "silence" of petitioner and her failure to disclose certain exculpatory evidence during police interviews in this case did not occur while she was "in custody" nor "in the wake" of being given her Miranda warnings, but instead occurred prior to the necessity of any warning being given. A review of the facts in this case reveals that petitioner's interview with the police did not fall within the parameters of "custodial interrogation" under the four criteria outlined in Brown v. Beto, 468 F.2d 1284, 1286 (5th Cir. 1972).

Petitioner's failure to shed tears was not "silence" within the purview of Doyle, supra, and the testimony and prosecutor's comments thereon were not violative of petitioner's constitutional rights.

EXCLUSION OF HELPFUL EVIDENCE

Petitioner argues that her rights under the Fourteenth Amendment were violated because the trial court improperly excluded evidence which she contends would have strengthened her defense. It is fundamental that federal courts possess only limited authority to consider state evidentiary rulings in a habeas proceeding by a state prisoner. Burgett v. Texas, 389 U.S. 109 (1967); Nordskog v. Wainwright, 546 F.2d 69, 72 (5th Cir. 1977). The "mere violation of evidentiary rules by the state trial court does not in itself invoke habeas corpus relief, but only where the violation of the state's evidentiary rules results in a denial of fundamental fairness should habeas be granted." Cronnon v. State of Alabama, 587 F.2d 246, 250 (5th Cir. 1979); Pentecost v. Estelle, 582 F.2d 1029, 1031 (5th Cir. 1978). Any alleged error must be found to be "material in the sense of a crucial, critical, highly significant factor." LaRoche v. Wainwright, 599 F.2d 722, 726 (5th Cir. 1979); Hills v. Henderson, 529 F.2d 397 (5th Cir. 1976), cert. den. 429 U.S. 850.

Reviewing petitioner's enumerations of alleged evidentiary rulings, this Court concludes that such rulings by the trial court, even if erroneous, were not so prejudicial as to have denied petitioner fundamental fairness. Accordingly, petitioner's claim is without merit.

"MIND-ALTERING" DRUGS

Petitioner presented evidence before the state habeas corpus court in support of her contention that she suffered from the effect of "mind-altering" drugs administered to her by the state before and during the trial. The state habeas corpus court concluded from the testimony and evidence presented to it that petitioner had been given no such unauthorized personality-altering drugs and that petitioner had not carried the factual burden of this claim. This

finding of fact by the state habeas corpus court is presumed correct and will be left undisturbed. 28 U.S.C. §2254(d).

APPLICATION OF THE DEATH PENALTY

Petitioner claims unconstitutionality because the death penalty in her case was applied arbitrarily, discriminatorily on grounds of race and poverty, and constitutes cruel and unusual punishment. Her first attack centers on the exclusion for cause of all jurors irrevocably committed against capital punishment, which in her view results in an unconstitutional prosecution-prone jury not composed of a representative cross-section of the community. She acknowledges in her brief, however, that in Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), the United States Court of Appeals for the Fifth Circuit held a similar claim to be insufficient as a matter of law. Spinkellink, supra, is controlling and petitioner's jury claims are without merit. See Chenault v. Stynchcombe, 581 F.2d 444 (5th Cir. 1978).

In Gregg v. Georgia, 428 U.S. 153 (1976), the Supreme Court of the United States upheld the Georgia capital punishment statutes "on their face." Subsequently, in reviewing the Florida death penalty statutes and interpreting the line of cases from the Supreme Court of the United States plowing new ground in the area of capital punishment, the Fifth Circuit Court of Appeals in Spinkellink, supra, determined that capital punishment is not unconstitutional per se, and that if it chooses to do so a state can punish murderers by imposing the death penalty as long as it does so through a statute with appropriate standards to guide discretion. The court stated:

> . . .[t]his court reads Furman, Gregg, Proffitt, Jurek, Woodson, and Roberts as holding that if a state follows a properly drawn statute in imposing the death penalty, then the arbitrariness and capriciousness - and therefore the racial discrimination - condemned in Furman have been conclusively removed. 578 F.2d 582, at 613.

Petitioner's allegation that Georgia's capital statutes were applied in an arbitrary and discriminatory manner in her case are without merit. Spinkellink, supra. Obviously, as set forth in footnotes 28 and 40 of Spinkellink, supra, a federal habeas corpus review and evidentiary hearing would be warranted when the petitioner shows some specific act or acts of discrimination against her or that the facts and circumstances of her case are so clearly undeserving of capital punishment that to impose it would be patently unjust and would shock the conscience. Neither showing has been made by this petitioner and this Court does not find compelling the evidence submitted on petitioner's behalf concerning this issue.

Ga. Code Ann. §27-2512 sets electrocution as the means of executing the death sentence in Georgia, which means petitioner challenges as being cruel and unusual punishment in violation of constitutional amendments. As recognized by petitioner in her brief, this issue was decided in a manner adverse to her in Spinkellink, supra. Thus, this claim is without merit.

For all of the above-stated reasons, this petition for habeas corpus relief is hereby DENIED IN ITS ENTIRETY.

THIS 24th day of March, 1981.

JOHN D. CAREY
UNITED STATES MAGISTRATE

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